

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FRITO-LAY NORTH AMERICA, INC. * Civil Docket No.
* 4:12-CV-74
VS. * Sherman, Texas
*
* February 12, 2013
MEDALLION FOODS, INC, ET AL * 9:00 A.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JUDGE AMOS MAZZANT
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Proceedings recorded by mechanical stenography,
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11 *****

12 P R O C E E D I N G S

13
14 (Jury out.)

15 COURT SECURITY OFFICER: All rise.

16 THE COURT: Please be seated.

17 Good morning.

18 Do we have something to take up before we
19 take up opening statements?

20 MR. DURST: Plaintiff has nothing, Your
21 Honor.

22 MR. HILL: Defendants don't either, Your
23 Honor.

24 THE COURT: Very good.

25 And then y'all have lapel mics, so you

1 are not strapped to the podium or anything like that.
2 And what we'll do is my plan is to go ahead and have the
3 Plaintiff take up their opening statements. We will
4 take a short break, and then we'll come back to the
5 Defense. And depending on the time, we will take a
6 little short break, and then start the evidence -- admit
7 the exhibits and start the evidence. And we'll see
8 where we're at.

9 Okay. Go ahead and bring the jury in.

10 COURT SECURITY OFFICER: All rise for the
11 jury.

12 (Jury in.)

13 THE COURT: Please be seated.

14 Good morning, Ladies and Gentlemen. It
15 is now time for opening statements. I will call upon
16 Plaintiff, Mr. Durst, and have him give his opening
17 statement.

18 MR. DURST: Thank you, Your Honor.

19 Your Honor, Ladies and Gentlemen of the
20 Jury, may it please the Court.

21 The people at Frito-Lay worked long and
22 hard on Tostitos SCOOPS!. They are proud of their hard
23 work as any of us would be. This has been a very
24 successful product for Frito-Lay, and we feel like it
25 has been taken unfairly from us.

1 You will hear from our people, our
2 witnesses, who will tell you about the hard work that's
3 gone on to this -- into this. And you'll also hear from
4 the Defendants' witnesses. You will hear evidence about
5 what has happened with the misappropriation of our trade
6 secrets, how Defendants are infringing our patent, and
7 how the Defendants intentionally copied the shape of
8 SCOOPS!.

9 The intellectual property in this case is
10 around this chip, the process that makes this chip, and
11 the packaging in which Frito-Lay has sold this chip.

12 There's much more to this than meets the
13 eye. You will shortly hear from the head of Frito-Lay's
14 Research and Development, that the development process
15 that led to Tostitos SCOOPS! was one of the most
16 complicated processes that Frito-Lay has undertaken in
17 its nearly 80 years of existence.

18 This fellow's name is Mike Zbuchalski.

19 Tracy, would you turn the flip chart
20 there for us.

21 I am going to be talking about a number
22 of businesses in my opening statements this morning from
23 Frito-Lay but also from Ralcorp and Medallion and third
24 parties. Mr. Zbuchalski is listed there as the first
25 witness, and when you read his name you'll understand

1 why I call him Mr. Z or Mike Z.

2 So he will come and talk to you about the
3 development process that led to SCOOPS!, and you're
4 going to hear a lot of the details about how this
5 unfolded. One of the things that Mr. Zbuchalski is
6 going to tell you is about all the people that were
7 involved in this.

8 Frito-Lay invested nearly 70 people years
9 in the development of this product. It happened over
10 the course of about seven years, and there is the
11 equivalent of 70 people years, full-time employees, 70,
12 that led to the development of SCOOPS!, the process that
13 manufactures SCOOPS!, and the way in which we sell them.

14 Now, what were those people doing?

15 This is the SCOOPS! team (indicating)
16 Mr. Siebman showed you in voir dire yesterday. What
17 were they doing?

18 It's a long list. Mr. Zbuchalski is
19 going to tell you about some of that. They were
20 creating ideas. They were doing consumer research.
21 They were developing product identities. They were
22 making prototypes. They were testing with consumers
23 developing the recipe, designing the equipment,
24 packaging the product, figuring out how to scale-up
25 manufacturing, testing at the pilot plant, starting up

1 the factory, and launching the product.

2 Alexa Williams, Dr. Alexa Williams at my
3 left here, was one of those people. You will get to
4 hear from her during the trial. And Mr. Siebman showed
5 you this team in voir dire a minute ago. The fellow in
6 the middle near the back right there is a guy named Rick
7 Ruegg.

8 Rick will tell you about how he came up
9 with the idea, that is, the shape of Tostitos SCOOPS!
10 today. He will take the stand and tell you the story
11 about how that was developed.

12 So you'll hear from Dr. Williams. You'll
13 hear from Rick Ruegg. You'll hear from Mr. Z.

14 Frito-Lay worked on this case -- on this
15 product from 1994 to 2007, 7 years, 70 people years, and
16 over \$150 million invested in the development of this
17 product.

18 And it's been a success. Consumers
19 bought nearly 130 million bags of Tostitos SCOOPS! last
20 year. Just last year, 130 million bags in the United
21 States. Consumers love the product. Frito-Lay
22 advertises it; invests heavily in that brand to get the
23 word out to consumers. It's on TV. It's in print.
24 SCOOPS! is what you might call famous.

25 They have even made a television show

1 about SCOOPS! through the Food Network. They have a
2 show called Unwrap that focuses on unique and
3 interesting and exciting new products. SCOOPS! is
4 featured in that. That's about a four-minute clip. I
5 suspect you're going to see it during the trial, and
6 there's not much secret in there, but it's an
7 interesting piece.

8 And what it demonstrates is the success
9 that Tostitos SCOOPS! has had, how much consumers are
10 fascinated by this product, and how much they love it.

11 Now, where do the Defendants come in?

12 The Defendants have been -- and I'm going
13 to choose my words carefully here, because I am going to
14 quote their president. The Defendants have been in awe
15 of this product since the day we launched it. That was
16 back in 2001.

17 You heard in voir dire and you will hear
18 in the evidence that Defendants launched their product
19 in 2012, 11 years later.

20 Rusty Karschner testified in this case --
21 this is a picture of Mr. Karschner. He's the -- he was
22 the Medallion president in 1995, and he stayed there
23 until about 2007. And he told us under oath that
24 Medallion had been in awe of the product, and he's
25 talking about Tostitos SCOOPS!.

1 And when he was asked in his
2 deposition -- you'll hear it -- my colleague,
3 Ms. Kennedy, asked him the question: If you were in awe
4 of it, why did it take you 11 years before you launched
5 your emulation product?

6 And you'll see what he says: We just
7 didn't know how to do it. We didn't know how to emulate
8 SCOOPS!.

9 That's Mr. Karschner's testimony under
10 oath in the case. They would have loved to have a chip
11 like it, but they couldn't figure out how to do it.

12 Well, that's what brings us here, because
13 their efforts to end run our intellectual property
14 rights lands us in this courtroom today.

15 Medallion had a manufacturing plant over
16 in Newport, Arkansas. It's just down the road from one
17 of Frito-Lay's SCOOPS! lines. We have a SCOOPS! line in
18 Jonesboro, Arkansas.

19 Medallion is owned and controlled by
20 Ralcorp, which is the other Defendant in this case.
21 Ralcorp is now owned by ConAgra, which is a big company
22 based up in Nebraska. ConAgra and Frito-Lay are about
23 the same size, both multi-billion-dollar companies.

24 This case is about how the Defendants
25 acquired or had the motive, the means, and the

1 opportunity to commit their wrongful acts. Medallion
2 had the motive. You see it here, president of Medallion
3 telling you that they were in awe of SCOOPS!.

4 They had a problem. They didn't know how
5 to do it. So what changed?

6 A couple of things changed. In 2005,
7 Ralcorp acquired Medallion. Ralcorp is much larger than
8 Medallion, and having Ralcorp on board gave Medallion
9 access to funds to expand their product lines that they
10 would not have been able to do themselves. That is the
11 means.

12 This is the motive. Ralcorp became the
13 means.

14 What's the third piece?

15 The third piece, as all crime novel buffs
16 know, is the opportunity. Well, what was the
17 opportunity?

18 The opportunity arrived for Ralcorp and
19 Medallion in the form of a gentleman named Kent Vickery.
20 Kent Vickery is a former Frito-Lay employee. Worked for
21 us for five years. He told me in his deposition that he
22 was an expert on the SCOOPS! manufacturing line.

23 You'll hear about Mr. Vickery leaving
24 Frito-Lay. He called it a mutual departing of ways. He
25 collected a severance agreement. He signed a contract

1 and he went about his way. He wound up working at
2 Medallion in 2007. Started Medallion in 2007.

3 Medallion started what they call Project
4 Backhoe the next year, in 2008.

5 Project Backhoe is the code name that
6 Medallion and Ralcorp use for their BOWLZ product.

7 Project Backhoe -- you're going to hear a
8 lot about that in this case -- is the product, is the
9 method -- the project name that they gave to their
10 internal development efforts.

11 So the motive: They've had it since
12 2001. He said since the day we launched the product.

13 The means: Ralcorp arrives on the scene
14 in 2005.

15 And the opportunity: Mr. Vickery arrives
16 in 2007, and they began their work in 2008.

17 Let me spend a minute talking about
18 Frito-Lay. Frito-Lay makes snack products. We all know
19 them. Many people love them. You're going to learn
20 about Frito-Lay in this case and the way we do business.

21 And as the case goes forward, you're
22 going to hear lots of evidence about that.

23 But as it relates to this case, there are
24 two things that Frito-Lay does particularly well:

25 Innovation and creating brand identity.

1 Innovation -- you're going to meet
2 several of our Research and Development people. Mr. Z
3 is going to take the stand in a few minutes probably in
4 a few minutes or right after lunch. Dr. Williams is
5 going to testify, and I mentioned Rick Ruegg is going to
6 testify as well.

7 Listen to this: Frito-Lay launches
8 between 50 and 100 new items every single year. That
9 means, on average, Frito-Lay is launching a new item
10 either once a week or two times a week. One to two
11 times a week year in, year out Frito-Lay launches a new
12 idea. Now, some of those are flavor changes; some of
13 them are wholly new products. Some are on the scale
14 the -- actually Mr. Z will say none on the scale of
15 Tostitos SCOOPS!, and some are changed to a flavor in an
16 existing product.

17 But between 50 and a hundred new items
18 launched every year by Frito-Lay. That takes a lot of
19 effort. That takes a lot of work. It takes a lot of
20 people.

21 Frito-Lay is good at creating brands,
22 too. Look at this list of array of famous Frito-Lay
23 brands, and I could -- if I listed all their brands up
24 there, we wouldn't be able to see them. The space would
25 be crowded out. But look at these brands we all know

1 and we've all grown up with: Lay's and Doritos and
2 Ruffles and Cheetos, Tostitos, Fritos. That list could
3 go on and on.

4 Frito-Lay creates a brand identity of
5 quality and consistency, and that's incredibly important
6 to Frito-Lay and Frito-Lay's success, to Frito-Lay's
7 people and to its success.

8 Now neither of these, innovation or
9 branding, come easily. Both are the results of a lot of
10 hard work literally by thousands of people. Now, sure,
11 the company has been a business success, and they're
12 proud of that.

13 Consumers have benefited greatly too.
14 Frito-Lay has been a leader in listening to what
15 consumers want and bringing them what they're asking
16 for. Frito-Lay has been a leader in the healthy snack
17 segment. Not up here but it well could be in
18 Frito-Lay's line of baked products, for instance.

19 And fun things, too. Many of you have
20 seen the Doritos Tacos Locos at Taco Bell. Taco Bell
21 has now sold more of those tacos than there are people
22 in the United States in the first year of its launch.

23 That's a fun thing that Mr. Z and his
24 team worked on. He'll tell you a little bit about that
25 when he takes the stand.

1 You know, the truth is, without an
2 innovative company, without an innovator company like
3 Frito-Lay, companies like the Defendants wouldn't exist.

4 So think about it this way: If you
5 didn't have a strong branded company like Frito-Lay,
6 then the store-branded companies, like Ralcorp and
7 Medallion, wouldn't exist.

8 If you don't have a leader, you can't
9 have a follower. If you don't have an innovator, there
10 won't be a company.

11 The very existence of companies like
12 Ralcorp and Medallion is on account of Frito-Lay's
13 innovation. Frito-Lay knows that. We embrace that.
14 That's part of healthy innovation and competition in our
15 business world.

16 That's not what this case is about. This
17 case is about Ralcorp and Medallion crossing the line
18 and copying it. They did it unfairly, and we're suing
19 them.

20 I mentioned Medallion's plant over in
21 Newport. That same plant run by Medallion, they make 21
22 different products in that plant: Snack chips, corn,
23 potatoes, tortillas. 21 different products; 10 of them
24 are what they call Frito-Lay emulation food products.
25 They make 21 products; 10 of them are emulations of

1 Frito-Lay products.

2 So here's a few of them. If you look at
3 this slide, all I've done is put some of the Medallion
4 products there next to the Frito-Lay products. There's
5 their Nacho cheese product. You know that's targeting
6 Doritos Nacho cheese.

7 Here's their corn chip product. You
8 know, that's targeting Frito-Lay's Fritos product.

9 Here's their cheese puff product. You
10 know that's targeting Cheetos.

11 Here's the important point about this:
12 Frito-Lay is a brand leader. We know people are going
13 to follow us. Sure, when this stuff happens, it stings
14 a little bit, but Frito-Lay's first response is to
15 innovate, to make our products better.

16 This is the very first case in
17 Frito-Lay's history that I've been able to find that
18 Frito-Lay has sued a store brand for infringing
19 intellectual property rights. We just don't go around
20 suing people.

21 Even these folks, we didn't sue them for
22 the Nacho Cheese Doritos knockoff. We didn't sue them
23 for these corn chips that are targeting Fritos. We
24 didn't sue them for these puffs that are targeting
25 Cheetos.

1 So what's different about this case? In
2 this case, with this product, Frito-Lay has very
3 specific rights. We have trade dress rights in the
4 design of the chip. We have a patent on the process
5 that makes the chip.

6 And we kept certain parts of our process
7 secret or confidential so that our competitors -- so our
8 competitors don't benefit from our hard work on that, on
9 certain parts of our products.

10 So there are those three types of
11 intellectual property: The trademark, the trade dress,
12 the patent, and the trade secret. Those are the things
13 that the Defendants have infringed, and that's what
14 brings us here today.

15 Let me turn to the -- something I
16 sometimes do, and that's kind of keep a list of things
17 that I say, arguments that are going to be made in the
18 case, and I started this list yesterday when Mr. Hill
19 was talking in voir dire.

20 So what I have here -- I'm going to start
21 that list -- is what I'm going to call this list of
22 false arguments. You're going to hear these things from
23 the Defendants.

24 One of them -- and you heard a little bit
25 yesterday -- is that Frito-Lay is trying to eliminate

1 store brands with this lawsuit. That's untrue. That is
2 untrue.

3 We have thousands of competitors. Mr. Z
4 is going to tell you that there are a hundred new
5 competitors a year. We don't go around suing them. We
6 haven't sued Medallion for other things.

7 This is about BOWLZ and SCOOPS!, and
8 that's what this case is about. This case is not about
9 Frito-Lay trying to eliminate store brands with the
10 lawsuit.

11 The Defendants are going to try to
12 misdirect your attention away from the facts of the case
13 to this broad argument, and that's not what we're doing.

14 That is False Argument No. 1 that the
15 Defendants are going to make.

16 Now, let's turn to the claims in the
17 case, some of the specific evidence in the case.

18 So you're going to hear about this as we
19 go through the trial, is the discovery process. I think
20 probably you have some sense of how that works already.
21 But under the Court's rules, we have the right to
22 inspect the Defendants' files.

23 Now, we didn't get to see everything. In
24 fact, we only have e-mail up through May of 2012, but
25 we've got rights to their files, and we got some of

1 their internal documents.

2 And we got to take depositions of their
3 witnesses. Those folks appeared under oath and gave
4 testimony, answered our questions under oath, and we
5 took videos of those, so we're going to show you some of
6 those.

7 And the same is true for them. They got
8 to look at our files, and they got access to what
9 Frito-Lay had in its files that were relevant to the
10 case, and they got to take some of our depositions, and
11 I bet you're going to hear some videos played of our
12 people, too.

13 So that's the discovery process. So when
14 you hear about an exhibit or a document produced in
15 discovery, it came through this process, these rules
16 administered by Judge Mazzant about how the parties
17 exchange information relevant to the claims in the case.

18 And when you hear about depositions, all
19 that is, is testimony under oath that happen usually in
20 a law firm conference room with a court reporter, just
21 like this one, and a videographer, under oath, just like
22 they're in a court of law. They swore to tell the
23 truth.

24 So that's what discovery is. That's
25 where the evidence is going to come from and you're

1 going to hear in the case. It's going to come from the
2 documents, and it's going to come from the -- from the
3 witnesses.

4 So let me talk about the first set of
5 claims in this case, and that's the use of confidential
6 information.

7 You're going to see, by the way, Ladies
8 and Gentlemen, in this case, that I have a great team,
9 and Ms. Kennedy is right there, and she just handed me a
10 note, and she said we have e-mails later than May of
11 2012.

12 So you're going to see us working
13 together, because we put a lot of effort in this case,
14 and you'll hear from her and some of my other colleagues
15 as well.

16 Let's talk about misuse of Frito-Lay
17 confidential -- confidential information and trade
18 secrets.

19 So back to Medallion. This is Medallion
20 management team. It's a succession of people. Over
21 here on the left is Mr. Karschner. You saw his slide.
22 He was the former president of Medallion up through
23 2007. So he was president when Ralcorp bought them, and
24 he was president when Mr. Vickery was hired.

25 Mr. Karschner was succeeded by Andy

1 Westervelt right there in the middle. Mr. Westervelt
2 became the president of Medallion, and then when Ralcorp
3 took over, I think he kept his title for a while, but he
4 ran the plant. He was in charge of the plant over at
5 Medallion.

6 And after Mr. Karsch -- pardon me --
7 after Mr. Westervelt retired, that's when Mr. Vickery
8 took over in Newport, Arkansas. And Mr. Vickery is the
9 plant manager over Medallion in Newport.

10 Medallion only has one plant. A few
11 hundred people work there. And Mr. Vickery tells us
12 that he's in charge. And other people say that, too.
13 He's in charge at the plant at Medallion.

14 These people all have something in
15 common. They all thought that SCOOPS! was a desirable
16 product. Mr. Karschner used the most colorful language
17 when he said they were in awe of the product. But they
18 all have that in common. They thought SCOOPS! was a
19 desirable product.

20 They also had something else in common
21 and that is that they all used to work for Frito-Lay.
22 All three of these guys used to work for Frito-Lay.
23 But, you know, our point is -- on me saying that is
24 maybe not what you think. We're not saying that Mr.
25 Karschner took any information from Frito-Lay and used

1 it at Medallion nor are we saying that Mr. Westervelt
2 took any information from Frito-Lay and used it at
3 Medallion.

4 But let me be clear about this: We are
5 saying that Mr. Vickery took information, confidential
6 information, from Frito-Lay and used it at Medallion.

7 And the reason I make that point is this:
8 It's False Argument No. 2 of the Defendants.

9 You're going to hear this from them. You
10 already heard it. Got my false arguments misnumbered
11 here. We'll call this one No. 2 because that's where we
12 are. That Frito-Lay would keep people from changing
13 jobs. Frito-Lay would keep people from changing jobs.

14 You heard a lot of discussion yesterday
15 about people having general skills and knowledge and
16 moving around. That happens all the time.

17 Frito-Lay is an innovator. They're the
18 leader in this space. They have lots of employees.
19 People leave us and go to work for other people. We
20 hire people from other companies. Happens all the time.
21 That's not what this case is about. This case is about
22 one guy who left us, promised not to use our
23 information, and then disclosed it to them while they
24 built SCOOPS! -- they built BOWLZ; we have SCOOPS!. We
25 have SCOOPS!; they have BOWLZ.

1 So this is False Argument of the
2 Defendants No. 2, that Frito-Lay would keep people from
3 changing jobs. It is not true.

4 Now, talk about what these guys have in
5 common. Let me tell you what they did not have in
6 common.

7 Only Mr. Vickery had ever seen the
8 SCOOPS! line. Mr. Vickery told me, as I said a minute
9 ago in his deposition, that he was an expert on the
10 Frito-Lay SCOOPS! line at Jonesboro.

11 So you're going to hear testimony that we
12 have plants in a number of locations across the country,
13 and they're all virtually the same. Mr. Vickery was an
14 expert on the line that we had in Jonesboro.

15 These other guys had never even seen a
16 SCOOPS! line. Mr. Westervelt and Mr. Karschner, they
17 had never even seen the SCOOPS! line. You saw that in
18 what Mr. Karschner said when he said: We just didn't
19 know how to do it. We didn't know how to make SCOOPS!,
20 to make an emulation of SCOOPS! until Mr. Vickery
21 arrived.

22 So these guys have something in common,
23 but only Mr. Vickery had SCOOPS! information.

24 So they were in awe. They couldn't make
25 it. What happened? Those two things I mentioned.

1 Ralcorp comes on the scene with the deeper pocket, and
2 Mr. Vickery arrives.

3 Mr. Westervelt told us in his
4 deposition -- Ms. Kennedy asked him the question of what
5 started the process. He talked about it. Mr. Vickery
6 talked about it. In my deposition with Mr. Vickery, he
7 said one of the first things they did, Westervelt
8 started by asking Vickery if he thought that Medallion
9 could make a product like SCOOPS!. Almost out of the
10 bag, almost right out of the box one of the first things
11 they did is went to Mr. Vickery.

12 That's when Mr. Westervelt was still on
13 duty as the president, and said, can we make a product
14 like SCOOPS!? Mr. Vickery said, sure, we can make a
15 product -- we can make a product like SCOOPS!.

16 Over here in my chart, you see these
17 folks listed there. I put that up there so you can help
18 keep track of these folks that I'm talking about.

19 There's Vickery and there's Karschner.
20 I'm going to tell you about Trowbridge in a minute,
21 okay? And that's what -- the ones in red are obviously
22 the Defendants' witnesses, and people -- the ones in
23 black are ours.

24 Now, here's Mr. Vickery's contract. I
25 told you that he used to work with us, and when he left,

1 he signed a contract. Here is Mr. Vickery's contract.
2 Michael Kent Vickery agrees not to disclose or cause to
3 be disclosed in any way any information or documents
4 relating to the operations of the company. That's
5 Frito-Lay. Any information or documents relating to the
6 operation of Frito-Lay.

7 Mr. Vickery signed that document in 2006.
8 He says it's enforceable. He says Frito-Lay has kept up
9 with its end of the deal, and he acknowledges that he's
10 under this obligation to keep all information and
11 documents relating to the operations of Frito-Lay
12 confidential.

13 Mr. Vickery didn't follow that. He
14 didn't follow that contract. He told Medallion a whole
15 laundry list of things. You're going to hear about a
16 number of them here during the trial. He told them how
17 the overall process worked, the overall SCOOPS! process
18 worked. He told them who Frito-Lay's confidential
19 vendors were that helped them build the SCOOPS! line.
20 And he told them information about Frito-Lay's internal
21 quality control specifications.

22 You're going to hear the evidence played
23 out in this case. In fact, there's going to be one of
24 their witnesses that's going to testify that says that
25 Mr. Vickery could hardly resist talking about

1 Frito-Lay's process. Talked about it all the time.

2 One of the people that he talked to about
3 SCOOPS! is one of the folks that worked for him Mike
4 Trowbridge right here (indicating). Mr. Trowbridge is
5 an engineer who works for Medallion and who works for
6 Mr. Vickery.

7 Now, we asked him about the process of
8 learning about SCOOPS! and this is what Mr. Trowbridge
9 says. He said they reviewed the patent. Now, what he's
10 talking about there is the '344 patent, the patent we're
11 going to be talking about in this case. And as we all
12 know, the stuff that's in that patent is public, and
13 there's no claim in this case that the things in the
14 patent are trade secrets.

15 So discussion about how we did some of
16 those things in the patent, but the focus of trade
17 secrets is different than the focus of patents. They
18 infringed the patent, but the patent is not secret. So
19 what he says up there -- we had reviewed the patent --
20 we don't have any complaints about that.

21 That's part of our deal with the
22 government. You saw the handshake yesterday on the
23 video. We don't have any complaints about them
24 reviewing the patent.

25 But when Mr. Trowbridge was asked to

1 explain how they went about building their BOWLZ lines,
2 he said we referenced the patent. Then he went on, and
3 it's the -- he went on a piece -- that causes us to be
4 here talking about theft of trade secrets.

5 Kent was an ex-Frito-Lay employee. He
6 was familiar with the process, so he knew and he had
7 already told us how the process worked. We knew.
8 Vickery told them everything. Told them how the process
9 worked. They knew.

10 Mr. Vickery got a little frustrated with
11 me in the deposition at one point. You'll hear this
12 testimony. I asked him to give me a list of all the
13 things that he had told Ralcorp and Medallion about
14 Frito-Lay and about how Frito-Lay runs its business,
15 about Frito-Lay's information and documents. I asked
16 him to give me that list.

17 He said he couldn't do it, and the reason
18 he said he couldn't do it -- and I'm going to be careful
19 here to use the words that Mr. Vickery used. He said he
20 couldn't do it, because the information that had been
21 given to Frito-Lay (sic) had been, quote, given over a
22 long period of time, unquote, a lot of different topics.

23 He couldn't even list it all, all the
24 stuff that he had told Ralcorp and Medallion, about our
25 business, and about how we operate our plants and about

1 SCOOPS!.

2 You're going to hear that no one, not a
3 soul from Ralcorp or Medallion asked Mr. Vickery to stop
4 giving them Frito-Lay information. No one said you
5 shouldn't be giving us that. No one took steps to
6 prevent Mr. Vickery from giving the Frito-Lay
7 information -- Frito-Lay information. And some people
8 even asked him for Frito-Lay information.

9 And everyone -- I took the deposition of
10 the president of the company. Everyone from the
11 president on down to the people that work for
12 Mr. Vickery, everyone says that Mr. Vickery's actions on
13 Project Backhoe were in keeping with what the company
14 expected of him.

15 They knew what he was doing. He was
16 providing them information. They accepted it, and
17 you'll see how it infiltrated their process, their
18 SCOOPS! (sic) process. You know, they collected
19 information in other ways too, ways that they knew was
20 wrong, other ways besides Mr. Vickery.

21 You'll hear about how they arranged to
22 look at confidential Frito-Lay's SCOOPS! equipment.
23 They knew it was confidential. They specifically went
24 to look at the equipment so they could design their
25 equipment to be the same.

1 Now, let me show you a piece of evidence
2 from their files and e-mails. This is Mr. Vickery's
3 contract. We've already talked about that.

4 Here's an e-mail. This is a blowup of an
5 e-mail, so this is P43, if you're keeping notes. And if
6 you're keeping notes, Mr. Vickery's contract is
7 Plaintiff's Exhibit 308.

8 This is an e-mail that Mr. Trowbridge --
9 he's one of the engineers -- Mr. Trowbridge sent
10 Mr. Bender. Mr. Bender is a vice president of the
11 company. He works up in St. Louis at Ralcorp. At this
12 point, he was working for Carriage House, which is
13 another subsidiary, but Trowbridge sends Bender an
14 e-mail and he copies Vickery and he says -- this may be
15 hard for y'all to see -- but he says a couple of very
16 important things in this e-mail.

17 He said they're going to go visit a new
18 SCOOPS! line. They have been invited to go over to
19 Dallas to visit Quality Fab, and they're going to look
20 at a new SCOOPS! line being shipped out shortly.
21 It will give us the chance to look at exclusive
22 equipment. We think this will be a one-time
23 opportunity. This is what you're going to come to know
24 as the Quality Fabrication, the Quality Fab exercise.

25 So this is Trowbridge. He's telling

1 Mr. Vickery, his boss, and Mr. Vickery's boss,
2 Mr. Bender -- actually, he's not really in the direct
3 line -- but Mr. Vickery -- but -- but -- Mr. Ralcorp's
4 vice president, Mr. Bender, that I'm going to go look at
5 this exclusive -- exclusive equipment for the Frito-Lay
6 SCOOPS! line.

7 Now, after he went, after Mr. Trowbridge
8 went, he wrote another e-mail reporting on it. And,
9 again, this one is Exhibit No. 44, Quality Fab. And
10 this is Mr. Trowbridge's trip report where he is
11 reporting to Mr. Westervelt. We talked about who that
12 is. Some other people, including both Mr. Vickery and
13 Mr. Bender.

14 And one of the things -- you guys will
15 have this whole document before we're done -- but one of
16 the things he says about it is that this system was
17 high-end and top-of-the-line Frito-Lay specifications.
18 Down here at the very bottom too, he says: And, oh, by
19 the way, I took my camera and I took some pictures.
20 So we had a chance to ask the people some questions
21 about this little episode, the Quality Fab episode, in
22 deposition. I'm going to let you hear what Mr.
23 Trowbridge said about this. Listen to him. He will say
24 he knew the equipment was confidential; that he went; he
25 called it high-end Frito-Lay equipment, Frito-Lay specs;

1 and he knew it was wrong.

2 So Mr. Trowbridge is going to tell you
3 it's wrong. Mr. Bender is going to come to the stand
4 and admit on cross-examination that it was improper for
5 them to do this. They all knew what they were doing and
6 they went and did it anyway. Vickery approved the trip.

7 Now, some people say that when folks --
8 when we communicate with each other, 90 percent of what
9 we communicate is non-verbal communication. You know,
10 facial expressions, hand movements, fidgeting with the
11 hands. Watch Mr. Trowbridge's deposition and look for
12 his non-verbal communication as well as listening to his
13 words.

14 So let's go ahead.

15 (Video clip playing.)

16 QUESTION: You've been handed what's been
17 marked as Exhibit 43, which is marked RALMED 021101.

18 Do you recognize this document?

19 ANSWER: Yes.

20 QUESTION: You understand this to be an
21 e-mail from you to Mr. Bender and Mr. Vickery, dated
22 July 13, 2009?

23 ANSWER: Yes.

24 QUESTION: Beginning of the e-mail says:
25 Tim, Kent is available after 1:00 p.m. on Wednesday.

1 Steve and I have been invited to Dallas on Thursday to
2 visit Quality Fab's new F-L scoop line that is shipping
3 the week of the 20th.

4 Did I read that correctly?

5 ANSWER: Yes.

6 QUESTION: You understand that F-L scoop
7 refers to Frito-Lay's Tostitos SCOOPS!?

8 ANSWER: Yes.

9 QUESTION: It says: The purpose of the
10 visit is to look at the equipment and technology. QF
11 offered the visit, since they want to sell us some of
12 the same.

13 Did I read that correctly?

14 ANSWER: Yes.

15 QUESTION: And QF is Quality Fab?

16 ANSWER: Yes.

17 QUESTION: And when it says to sell us
18 some of the same, you understood that to be the same
19 equipment that they were providing to Frito-Lay for
20 their SCOOPS! line?

21 ANSWER: Yes.

22 QUESTION: Did you go?

23 ANSWER: Yes.

24 QUESTION: Did you look at the equipment
25 that was prepared for Frito-Lay Tostitos SCOOPS!?

1 | ANSWER: Yes.

2 | QUESTION: Did you take any pictures?

3 | ANSWER: Yes.

4 QUESTION: And you knew that Frito-Lay
5 had confidentiality agreements with its vendors,
6 correct?

7 | ANSWER: Yes.

8 QUESTION: You've been handed what's been
9 marked as Exhibit 44, which is labeled RALMED 019819.
10 What is this document?

11 ANSWER: This is a report of what we saw
12 at our visit at -- in Dallas at the Quality Fabrication
13 facility.

14 QUESTION: A third-numbered paragraph
15 refers to corn-cooking equipment. Do you see that?

16 | ANSWER: Yes.

17 QUESTION: The last sentence of this
18 paragraph says: This system is high-end and
19 top-of-the-line F-L specs.

20 Did I read that correctly?

21 ANSWER: Yes.

22 QUESTION: You understand that to be
23 Frito-Lay specifications?

24 ANSWER: Yes.

25 | QUESTION: So what you're saying in this

1 paragraph is that the system that you went and looked at
2 was made to Frito-Lay specifications?

3 ANSWER: Yes. Well, made to -- made to
4 Frito-Lay for Frito-Lay. I don't have any knowledge of
5 what their specifications are, but it was built for
6 Frito-Lay.

7 QUESTION: But that's what you said in
8 your e-mail, Frito-Lay specs?

9 ANSWER: Yes.

10 QUESTION: By specs, you meant
11 specifications?

12 ANSWER: Yes.

13 QUESTION: So what you were saying in
14 this e-mail is that the system was built to Frito-Lay
15 specifications?

16 ANSWER: Yes.

17 QUESTION: Does Medallion believe that it
18 was an acceptable business practice to go to look at
19 Frito-Lay's confidential equipment?

20 ANSWER: We -- we went to look at the
21 equipment that was on the floor. It could have been
22 anybody's equipment, I guess. So, again, we were -- we
23 were -- we were -- we were going to look at equipment --
24 equipment that we hadn't seen before. In this case, it
25 happened to be Frito-Lay equipment.

1 QUESTION: So did you think it was an
2 acceptable business practice to look at this equipment
3 that it was specified for Frito-Lay, knowing that
4 Frito-Lay had confidential agreements?

5 ANSWER: I have personally went to many
6 equipment vendors and looked at equipment that they
7 fabricate. And -- and -- in a lot of cases, it's not
8 our equipment. It's somebody else's equipment. So in
9 this instance, we looked at equipment that was on the
10 floor that was being sold to another company.

11 I didn't -- I didn't -- I didn't go with
12 the intent of anything other than looking at equipment
13 that I have never seen before. That was my intent.

14 QUESTION: Did you think it was an
15 acceptable business practice to go and look at this
16 equipment that was Frito-Lay-specified, knowing that
17 Frito-Lay had confidentiality agreements?

18 ANSWER: I guess I would say yes because
19 I went.

20 QUESTION: And is -- it's your
21 understanding that Medallion Foods, that's an acceptable
22 business practice?

23 ANSWER: It was probably not the best
24 decision that I ever made, you know. I -- you know, I
25 don't know what else to say.

1 (End of video clip.)

2 MR. DURST: Today, equipment just like
3 that exclusive Frito-Lay equipment Mr. Trowbridge went
4 to inspect sets over in Newport, Arkansas, in
5 Medallion's plant, being used to make BOWLZ. They are
6 doing it without our permission.

7 We're asking you to --

8 THE COURT: Mr. Durst, is your mic on?

9 MR. DURST: Thank you. Sorry.

10 We're asking you for your judgment in
11 this case about whether this type of behavior is proper.

12 That's a little sampling of the trade
13 secrets case. Let me move now to the trade dress case.
14 Talk about that.

15 Trade dress protects our proprietary
16 interest in the design of the package and of the design
17 of the chip. Trade dress rights arise from our use in
18 commerce.

19 As Judge Mazzant will tell you, if a
20 distinctive design is used in sales over time, you earn
21 the right to limit others from using designs that might
22 confuse consumers.

23 Here Frito-Lay has two types of trade
24 dress: The design of our chip and also the design of
25 this package that we used in 2012 and earlier for

1 selling Tostitos SCOOPS!.

2 Now, Defendants infringe both the chip
3 design with their chips and also the design of the
4 package, which they sell at Walmart. You will be asked
5 to determine whether consumers are confused.

6 And some things for you to remember:
7 There are different points for confusion. We talked a
8 little bit about this in voir dire. There's confusion
9 at the point of sale.

10 That's when it's on the shelf or maybe
11 even at -- confusing at the point of initial interest,
12 which is what some of the authorities say just means
13 when you see it on the bag -- on the shelf or at the
14 point of sale, which may be at the checkout counter.

15 But there's confusion in the grocery
16 store, and then there's something called post-sale
17 confusion. We talked about that.

18 Post-sale confusion is something that
19 happens when the consumers see the product out of the
20 bag, like at a party session -- party setting. We
21 talked about that during voir dire.

22 Frito-Lay is entitled to protection at
23 both of those places, both in the grocery store and the
24 things that go on there, and in the party setting where
25 the bags are shown out of the chips (sic).

1 Now, one point on voir dire yesterday, I
2 wanted to stand up when this was going on and set the
3 record straight, but I'm not supposed to do that in voir
4 dire, so I didn't get a chance to do that. And that's
5 when Mr. Hill started launching attacks about the test
6 that we did with the chips in the bowl.

7 MR. HILL: Objection, Your Honor. Just
8 as if I can stand up here, he could have stood up then.
9 That is a misstatement of the law to make this jury
10 think he was tethered in some way to his chair.

11 THE COURT: Okay. Sustained.

12 MR. DURST: Mr. Hill suggested there was
13 an unfair quest -- unfair test to be asking questions
14 about the chips out of the bag. You'll remember that.
15 He was asking questions about this post-sale confusion
16 and then asking and suggesting that that wasn't a fair
17 chest -- test.

18 Well, Mr. Hill, let me have it really for
19 saying that post-sale confusion was a test you ought to
20 be thinking about. Mr. Hill had it wrong.

21 I'm going to show you a passage from the
22 instructions that Judge Mazzant gave -- read to you
23 yesterday, and this is a document -- you'll see
24 something like this when the Judge gives you his final
25 jury instruction, but this is the document called

1 preliminary jury instructions that the Court read from
2 you -- read to you yesterday when he was introducing the
3 case, and he talked about this very issue. He talked
4 about confusion and where it can occur.

5 And I'm going to show you several things
6 on this, but here's a passage from that: Confusion --
7 I'm focusing here at this point right at the moment.
8 Confusion can occur at any point that consumers
9 encounter a product: Before buying it -- that's at the
10 grocery store -- at the moment of purchase -- that's
11 really at the checkout stand, still in the grocery
12 store -- or after buying it. After buying it is
13 post-sale confusion.

14 So that's the legal test you're going to
15 be asked to apply. Does confusion occur at any point,
16 even when the chips are setting there at (sic) a bowl on
17 the table?

18 You know, think of this as like a Super
19 Bowl party test, right? You're at a Super Bowl party.
20 There are a bowl of chips out there, and you've got an
21 eye on the television screen watching the game, and
22 you're putting your hand in a bowl of chips to take a
23 bite.

24 Or maybe somebody will have a Mardi Gras
25 party tonight. And that might even happen this evening.

1 But think of that post-scale confusion as the legal word
2 for that type of a test, the Super Bowl party test.

3 You know, that brings up another point
4 that I wanted to tell you about the demonstration
5 yesterday. Mr. Hill made a fuss about the date on the
6 bag. As you heard in voir dire yesterday, Ms. Kennedy
7 and I have a number of folks that are working with us
8 from our firm on this case, and I want to tell you about
9 something that happened last night.

10 One of the young associates that's
11 working on this case from my law firm came to me in my
12 office over at Mr. Siebman's place, and she had seen
13 Mr. Hill tear into me in voir dire. She was visibly
14 upset.

15 She apologized to me for not noticing the
16 date on the bag that we used in that -- in that little
17 demonstration. You see, she had just reached in our
18 evidence files, because we've been keeping things since
19 this case started a year ago and just grabbed a bag of
20 chips out of there. Didn't pay any attention to the
21 date on the bag.

22 And I said to her last night, I said,
23 first, my responsibility. I'm the one that made the
24 argument in Court, and I should have checked that date
25 on the bag.

1 But, second, don't beat yourself up too
2 badly about this. It was an honest mistake, one any of
3 us could have made. None of us looked at that date on
4 the bag. And the reason we didn't look at the date on
5 the bag is because it was irrelevant to the test.
6 The date on the bag didn't matter. That test was not
7 about freshness or the date of the bag. That test was
8 about the shape of those chips.

9 You'll remember these chips we used
10 yesterday -- here's a -- they're all kind of messed up
11 in this box now, but the rest of them are in here. And
12 here's the chips we used, and here's the bag that had
13 the expired date on it.

14 I brought with me this morning another
15 bag of chips. This one I bought personally at Walmart
16 on Saturday before I came up here from Dallas. Its
17 expiration date is April 21 of 2013. Find a formed chip
18 in here somewhere, not the broken ones.

19 That test we did yesterday was about the
20 shape of the chip. In my left hand is a chip out of
21 this newly opened bag. In my right is a chip out of the
22 bag that had the expired date on it.

23 You see that chip, that demonstration we
24 did yesterday, was about whether the chip design is
25 confusing to customers. The chip design doesn't change

1 by the date of the bag.

2 The whole exercise yesterday about the
3 expiration date was just misdirection. This is about
4 the fact that consumers are confused by the design of
5 this chip, thinking it's a Tostitos SCOOPS!.

6 Remember when we asked those questions in
7 the courtroom yesterday, nearly everyone, dare I even
8 say some people over at that table over there, were
9 confused and thought those were Tostitos chips.

10 Mr. Hill's focus on the date of the bag
11 was just an attempt to get you to move your focus off of
12 the facts that matter in the case, which is the design
13 is confusingly similar to Tostitos SCOOPS!.

14 Our rights in using this chip design,
15 they come from use. So let me just make a couple of
16 comments about how we chose this design.

17 Now, we already had a -- before we
18 started Tostitos SCOOPS!, we already had Fritos SCOOPS!.
19 You guys have seen those, too. We've got a picture up
20 here.

21 So Fritos SCOOPS! -- thanks, Tracy.

22 Fritos SCOOPS! on the right, that's a
23 product we've had out there for some time in the
24 marketplace, and it's successful. We liked it, and the
25 company thought maybe we should try to do something like

1 that with Tostitos SCOOPS!.

2 Well, it didn't turn out to be quite so
3 easy, as you're going to hear. But the design team
4 worked hard and conducted a lot of consumer research and
5 determined, what is the best shape to communicate the
6 Tostitos brands to consumers.

7 Well, of course, being a good dipping
8 chip. They knew they wanted a chip that would hold
9 liquid, but there were a lot of different ways to do it.
10 What they came up with here was a chip with many
11 different design elements and one that matches the
12 Tostitos brand.

13 So this is the design of the chip. This
14 is what we have trade dress rights in. It's made up of
15 a combination of elements.

16 There are, for instance, an overall round
17 appearance. It's the round bottom of a bowl-shaped
18 chip. It has essentially uniform flutes that run the
19 entire height of the chip. It gives you a starlike
20 impression.

21 It's made up of a combination of
22 elements. The overall combination of those elements is
23 a design choice. It's like a piece of art. It's a
24 design choice for the design of that chip.

25 Frito-Lay made this chip selection --

1 Dr. Williams is going to tell you about this -- selected
2 this design of SCOOPS! because our consumer research
3 showed us that it brought to mind Tostitos Rounds, that
4 Tostitos Rounds -- you guys have seen those,
5 bite-size -- Tostitos Rounds communicates to the
6 consumer that this is a Tostitos product, and SCOOPS!.
7 SCOOPS!, this particular design of SCOOPS!, also
8 communicates that to the consumer.

9 In fact, Dr. Williams is going to tell
10 you that on some of the consumer tests we did, other
11 shapes performed better. But we chose this one because
12 of its match to the Tostitos brand.

13 There were lots of alternative designs
14 available and possible. You're going to hear testimony
15 about those, canoes. Dr. Williams tested the canoes
16 shape. I'll show you what that looks like when she
17 testifies.

18 Ladles, spoons, they all hold liquids.
19 They have walls to hold things in. They're useful. But
20 they wouldn't communicate the brand to the consumer like
21 this design does. They wouldn't communicate Tostitos
22 like this design does.

23 That brings me back over here to my false
24 arguments piece. I got these all out of order, but
25 we've already done No. 2. Go to the next one. And it's

1 this one right here. Frito-Lay wants to eliminate all
2 choices.

3 You'll hear them use words like -- and
4 you've heard them already -- use words like monopoly,
5 mean-sounding words to suggest that Frito-Lay wants to
6 eliminate all choices. It's just not true.

7 There are other choices. There are other
8 chip designs that hold liquids, have walls, are useful
9 in the same way these chips are.

10 There's spoons, like an Asian soup spoon
11 kind of thing you see at a Chinese restaurant. There
12 are ladles. There's canoes. We'll show you a whole
13 bunch. They considered some, too, the Defendants did.
14 There's a whole bunch of ways to do this.

15 We're not trying to eliminate all
16 choices. What we're entitled to under the law is that
17 no one will have a design that's confusingly similar to
18 our design. Again, that's what this case is about.
19 It's not about Defendants' false statements.

20 After we've been selling this chip for
21 more than two years, Frito-Lay decided to apply for a
22 trademark registration. We got our rights from the use,
23 and we decided in 2003 to apply for a trademark
24 registration.

25 This is the trademark registration. This

1 is Plaintiff's Exhibit No. 1. This is the certificate
2 that the United States Patent and Trademark Office gave
3 us to evidence our rights. Our rights came from the
4 fact that we had been using this chip, and this is the
5 certificate that the government gave us to evidence our
6 rights.

7 And you see that the words of the
8 trademark say: The mark consists of the bowl-shaped
9 configuration of the goods. You saw the video
10 yesterday. Remember the one video -- one juror or two
11 that had a son that worked for the United States Patent
12 and Trademark Office as an Examiner.

13 The Examiners examine the trademark
14 application in some of the same ways that they examine
15 the patent application. And when they do that, they're
16 looking at -- what does this say -- the mark consists of
17 the bowl-shaped configuration of the goods. They're
18 looking at the goods.

19 These are the goods. This is what's in
20 the trademark file. This is from our application,
21 January 7th of 2003. This is what we submitted to the
22 U.S. Patent and Trademark Office as part of our
23 application process.

24 Now, the examination process that the
25 folks go through up in Washington, they asked

1 themselves: Is this a protectable design? Is it
2 functional? Is it ornamental? Ornamental is
3 protectable. Something that's only functional is not
4 protectable. The Examiners asked that question.

5 And they asked the question, too, about
6 whether the drawing that we have in the mark is
7 substantially -- the test is substantially the same as
8 these sample chips. The Examiners looked at that, the
9 experts in Washington looked at it and approved our
10 registration for that chip.

11 Now, this design of the chip is the same
12 design we have been using since 2001. It's the same
13 design we're using today.

14 We showed -- we showed the U.S. PTO this
15 piece of advertising. Defendants are going to make a
16 big fuss about us -- actually pay a lot of attention to
17 our advertising and about how our advertising talks
18 about dippable, about dips and shows -- shows the chips
19 being used with dip, and they're going to say that means
20 it's functional. It should not have been allowed. It
21 should not be a trademark. It's not entitled to trade
22 dress protection.

23 But this is an actual piece of evidence
24 that we showed to the U.S. Patent and Trademark Office.
25 It has all that same stuff on there, has the good for

1 dipping and has the picture of the dip -- the chip with
2 the dip in it (sic), and the Examiner gave us our
3 certificate that we have, which is Exhibit No. 1 in this
4 case.

5 That examination process was repeated in
6 2009, and it's underway again now. And what I have here
7 on Slide No. 121 is an example of what we submitted in
8 2003, and then our five-year anniversary period, it's
9 the bag, and then you see the chip over there with the
10 dip in it (sic).

11 And then the -- the affidavit that's
12 underway right now, those are pictures of the chips that
13 we sent up to Washington to the Patent and Trademark
14 Office.

15 Let me spend a minute about
16 functionality. So they're going to argue that our
17 design is not protectable because it's useful.

18 The test, though, is not is it useful?
19 Judge Mazzant is going to give you the test, and the
20 test is whether the overall combination of elements is
21 essential to the use.

22 Well, as you saw from this ad -- and
23 you'll see from other ads, we do talk about the use. We
24 talk about dips. We show dips. We show people holding
25 chips with dips in it (sic). It is useful. There's no

1 doubt about that.

2 We even talk about the usefulness of a
3 chip that holds liquid in one of our patents, in this
4 patent that's in suit today. We talked about that.
5 It's not a secret. It is useful. But that's not the
6 test. It's the overall appearance, the overall
7 combination of elements. Is it essential to use? It's
8 not. It's a design choice.

9 Talked about the other shapes that
10 Dr. Williams continued, considered the canoes, spoons,
11 ladles, that sort of thing. It was a design choice to
12 go with a star-like chip.

13 Now, what are some of the other things
14 that are protectable that are functional?

15 Here's one. I jumped ahead a minute ago.
16 You guys recognize this. I had to get special
17 permission from my client, Pepsi, to show this bottle,
18 but this is the Coke bottle. You see the silhouette on
19 the right. You recognize that's a Coke bottle because
20 of the shape of the bottle.

21 What does the bottle do?

22 The bottle holds liquid. It functions as
23 a container to hold liquid. Some would even say that
24 this is functional in that it has those ridges around it
25 to help you grip it. But you see, this Coke bottle is

1 Coke's trade dress. It's functional, serves a use, but
2 it is a design choice. The Pepsi bottle looks
3 different. The Dr Pepper bottle looks different.
4 This is a design choice of Coca-Cola. It has design
5 elements in it. It serves a function in that it is
6 useful, but it is protectable trade dress. Our chips
7 are the same way.

8 Here are a couple of other examples. You
9 see the Hershey bar; you recognize that. You know what
10 those ribs are for. That's for breaking up pieces if
11 you choose to share it with someone. They serve a
12 function; they're useful; they help you break it, but
13 that's -- that's protectable trade dress. Hershey
14 protects that jealously.

15 And the other thing on the right is a
16 Weber grill in that particular shape. Weber says that
17 helps you -- helps you cook your meat better, smoke it
18 better, but that's a protectable shape. It serves a
19 function, but it's a design choice, just like the
20 Hershey bar.

21 Our chip is the same way. They are going
22 to attack our trademark saying it's functional. They
23 are also going to attack our trademark saying we
24 abandoned it. Well, you are not going to hear me say
25 this very often, but I'm going to say it now: That's a

1 silly argument. That's a silly argument, that we have
2 abandoned our trade dress.

3 I showed you pictures a few minutes
4 ago -- see if I can go back to them -- there we go.
5 The chips in the upper right-hand corner are from 2003.
6 There will be evidence that the chips were out two years
7 at that point in time. And the chips down here on the
8 bottom, that's a 2012 or 2013 picture. It's the same.
9 The molds haven't changed. The design of the molds
10 haven't changed. The design of the molds we make to use
11 these chips haven't changed.

12 Now, you know they vary a little bit.
13 Mike Z likes to say -- he will testify that that's
14 Mother Nature at work, because we're dealing with corn.
15 We're not dealing with plastics or steel. We are
16 dealing with corn models. And so the shape of the chip
17 from chip to chip is going to vary just a little bit.
18 But when you see that design, you know it's a Tostitos
19 SCOOPS!. Just like when you see a fingerprint, they're
20 not all the same. You know it's a fingerprint. Or when
21 you see a snowflake, they're not all the same, but you
22 know it's a snowflake.

23 So this is true with the design of our
24 chip as well. It happens with other trademarks. You
25 all have all seen this. When you go on the Internet.

1 Google likes to mix up its marks, changes it all the
2 time, but you always know it's Google.

3 To say that we have abandoned our trade
4 dress because our chips vary from chip to chip is just a
5 silly argument.

6 All right. Just a quick word about the
7 design of the bag. So this is our -- this is our -- the
8 design of our bag right here (indicating). You've seen
9 it. This is our trade dress, and this is where we have
10 protection.

11 They set out to copy not only the design
12 of this bag, but they also set out -- there's the bag
13 that they copied. That's what they sell at Walmart
14 right there. You see some of the same styling of
15 lettering, some of the same general coloring. You see
16 the bowl with the chip going into it, salsa. You see
17 the window that looks like the chips are going into the
18 bag. That's the other piece of our trade dress. It's
19 the -- it's the bag.

20 Now, Defendants set out to emulate. They
21 set out to copy.

22 I want to show you a slide that is from
23 their Project Backhoe document. I'm going to have to
24 move around just a little bit here, and I apologize for
25 having to jump the slides. I skipped over that a little

1 bit earlier. It is right there (indicating).

2 What is Project Backhoe?

3 This is one of the documents we got from
4 their internal files. It's where they -- it's at the
5 outset of their -- their project. It's Plaintiff's
6 Exhibit No. 32. What is Project Backhoe?

7 Project Backhoe, this says, is Tostitos
8 SCOOPS! emulation project. The basis for this
9 presentation is to introduce Ralcorp leadership to the
10 top line of this project. In addition, we hope to gain
11 concurrence to move forward.

12 Tostitos SCOOPS! emulation project, this
13 is a document they used internally to kick off what they
14 call Project Backhoe. No coincidence that that
15 PowerPoint has a Backhoe scoop on the front of it. They
16 set out -- they set out to copy and to emulate.

17 Now, Tracy, could you move forward back
18 to where we are. It's probably going to be at 120.
19 Thank you.

20 This is Mr. Trowbridge again. There are
21 two things about this that I want to mention to you.
22 We're asking him here where they came up with the design
23 of their chip and how they came up with it. And he
24 says: Well, we wanted it to be useful. We wanted it to
25 be dipping.

1 And we asked him then were there any
2 other characteristics. Well, we wanted to stay close to
3 the shape that's on the market -- that's us; that's
4 Tostitos SCOOPS!

5 And was there anything else? Anything
6 beyond shape?

7 Mr. Trowbridge told us shape and
8 function.

9 And why do I emphasize that?

10 I emphasize that because the Defendants
11 are going to tell you that it's all about function, but
12 it's not all about function. It's about both shape or
13 design and function.

14 Mr. Trowbridge says here, and he said it
15 in some of the other documents, and so did others at
16 Ralcorp: They are two different things.

17 Let me show you one more thing about
18 their copying, and that is -- we showed you the design
19 of the bag.

20 Tracy, can you go to the slide that is
21 the Great Value array?

22 This is an example of what they did with
23 their package. They moved their package over to look
24 like this, even though the other products that were
25 being sold at Walmart looked like the ones on the right.

1 Do you have any doubt about what the
2 intent of that was, this picture makes that clear.

3 Now, let me jump forward. I'm going to
4 go to the patent. This is our patent right here
5 (indicating). This thing on the top is the patent
6 itself. It's addressed with a seal from the United
7 States Patent & Trademark Office. And this is the
8 evidence. This is called the file history, examines the
9 work that the Examiner did in issuing this patent,
10 considering this patent.

11 One thing is clear. The Defendants are
12 not challenging the validity of the patent. You heard
13 about that in the video yesterday. Defendants sometimes
14 challenge the validity of a patent. That's not at issue
15 here. They agree they do not take issue with the fact
16 that the United States Patent & Trademark Office
17 properly granted us this patent.

18 So this case, when it comes to the
19 patent, is all about infringement. It's all about
20 infringement. When we get to the details of that
21 infringement, I want to tell you about two other
22 functional tidbits.

23 There were two stop signs installed; they
24 put up -- that were put up to them, that they ran right
25 past with respect to our patent, heading to a patent

1 infringement.

2 Mr. Vickery told them that we used
3 Wolverine for our SCOOPS! so these folks went over to
4 talk to Wolverine about helping them work on Project
5 Backhoe. Wolverine told them: We cannot get involved
6 because of legal concerns. Medallion knew what they
7 were talking about. They were talking about the patent
8 is what Wolverine was talking about. They tried to get
9 confidential information from Wolverine.

10 They went -- when Wolverine said no, they
11 went to Jim Young, who's a former Wolverine employee.
12 When Jim Young told them I can't give you any Frito-Lay
13 confidential information, they stopped calling.

14 Wolverine, that's one of the stop signs
15 they have on the patent.

16 The other is from Reading Bakery Systems.
17 Medallion went and asked Reading to be involved in
18 building their BOWLZ lines, and Reading told them that
19 they could not be involved because Project Backhoe would
20 infringe this patent.

21 Mr. Bender, who you're going to hear
22 testify, says that Reading told us this patent is,
23 quote, very tight, unquote, and Reading was concerned
24 that the design that Medallion was pursuing would
25 infringe the patent.

1 Now, Reading went ahead with them
2 eventually, but Medallion had to assure them that
3 Reading would not be involved in the design. So Reading
4 said we have concerns about this very tight patent, and
5 we will not be involved in the design of the system.
6 Reading saw the stop sign; Medallion didn't.

7 Now, the patent is infringed, and I'll
8 just tell you quickly that we will have Dr. John Floros,
9 who's the Dean at Kansas State University, come in to
10 talk to you about how the patent is infringed. The
11 dispute on the patent is relatively narrow, and I'll
12 show you what it is.

13 This is Claim 1 of the patent as well as
14 Claims 5, 6, 7, 8, and 12. The primary focus of this
15 discussion this morning will be of Claim No. 1. There
16 are several steps in Claim 1 of the patent: Sheeting --
17 feeding the substantially flat pieces at a feed speed
18 onto an alignment belt; adjusting, discharging, molding,
19 and drying.

20 And let me show you the pieces that are
21 at issue. In the discovery in this case, we were able
22 to ask the Defendants to commit on which of these are in
23 dispute. The Defendants admit that all of these items
24 are satisfied.

25 Now, to prove infringement, we have to

1 show that they satisfy these other two items, and they
2 relate principally to the alignment system.

3 Dr. Floros from K State has looked at
4 these elements. He's studied the patent. He's been
5 over to Newport to look at the system, and he's reached
6 the conclusion that, in fact, the patent is infringed.

7 Just a quick word about how the patent is
8 infringed. I'm going to show you now what is Exhibit
9 No. 38, which is a drawing here. You will come to know
10 this as Reading's emblem up here. They were concerned
11 about the process, stepped out of the design, but this
12 board is an overview of the Medallion system.

13 It is a little confusing, because it's
14 got two different views of a piece of the Medallion
15 system on there. So the corn-cooking and soaking, if
16 you looked at a tortilla chip manufacturing line, the
17 corn-cooking and soaking equipment, which is what
18 Quality Fab made for them, which they got from Quality
19 Fab to our specifications. They learned about our
20 specifications and then got it on their line. All of
21 that stuff happens up this way.

22 The corn masa that comes in here is
23 sheeted onto these alignment belts, and then it's baked
24 in this oven. So this is a side view of the line.

25 This is a view of what this same line

1 would look like if you were looking down on it. So the
2 picture itself is a little bit complicated because of
3 those two different views. But this is the side view
4 and this is the top-down view (indicating).

5 The key question are those two alignment
6 steps up there with respect to patent infringement.
7 Reading identified right here this middle part, this
8 part right here (indicating), includes the alignment and
9 phasing hardware and software systems.

10 There are two primary ways that they
11 satisfy that alignment claim. Now, first let me tell
12 you what is the alignment. So these little guys right
13 here, these circles, are molds. They cut these chips
14 when they're raw out on this shear. They put them on
15 these belts. They come down here and they go into
16 another one, and they drop them on a mold to cook them
17 in this shape.

18 So each of these is a precut piece of
19 masa that goes down the alignment belt. It needs to be
20 lined up to these molds and then drops on the mold and
21 goes in the oven and cooked and then it's fried, okay?

22 So this is what Reading described as the
23 alignment and phasing system, and in this system -- now
24 we're looking down on it, so it would be in this part on
25 the side as well. So looking down on it in this system,

1 Dr. Floros will tell you they align their chips, for
2 purposes of molding, two different ways, okay?

3 These multiple belts operate as one
4 alignment belt, one alignment system, and they change
5 the speeds of the belt to make alignments. It's like
6 a -- it's like going into a school zone. When multiple
7 cars go into a school zone, the first one goes into the
8 school zone slows down first. The second one that comes
9 in the school zone slows down later. And the gap
10 between those two, those two cars, close. They can move
11 shifts into alignment through that process.

12 The second way that Medallion aligns and
13 uses this claim of the patent is that this whole device
14 is set on a pivot point. So this device, these -- this
15 part of the manufacturing line moves this way in this
16 line. So they can pivot this whole operation. That
17 these chips -- the pieces coming this way on these
18 conveyors are not aligned to the molds. They can pivot
19 the whole system to align those two lines. Simple as
20 that.

21 Two ways to do it. Dr. Floros has looked
22 at it. He'll come in and tell you all about it and give
23 you the details.

24 I'm going to wrap up with just a quick
25 note about damages and tell you this: We're going to

1 ask you for damages in this case, and we're going to ask
2 you for damages that are built on the Defendants'
3 profits.

4 For the trade secret misappropriation
5 damages, we're going to ask you to award their profits
6 in their first year of operation, which is \$4 and a half
7 million. That number might actually be updated by the
8 time you guys deliberate, because we're still waiting on
9 the January sales numbers.

10 But for their use of our trade secrets,
11 we're going to ask you to make them turn over their
12 profits on these infringing chips. These chips
13 (indicating).

14 Same thing with respect to trade dress,
15 the design of their chip, we're going to ask you to
16 award us their profits, which to the end of December of
17 2012 was about \$4,500,000.

18 With respect to their use of our patent,
19 we're going to ask you to require them to pay a
20 reasonable royalty. We'll have an expert come in and
21 explain to you what is a reasonable royalty, and the
22 Judge will give you some instructions on that. But
23 essentially, what that amounts to is a license for the
24 patent, that they pay for the use of the patented
25 invention, and that number is going to be \$3 million.

1 So those are the damage claims that we're
2 going to make in the case that you will be asked to
3 deliberate on that.

4 You know, I started my opening statement
5 this morning talking to you about the people at
6 Frito-Lay and how they worked long and hard on this
7 process. I thank you for your attention. Y'all have
8 been focused. You've taken good notes. I appreciate
9 that.

10 Frito-Lay, this is a good company. It's
11 got good, hard-working, honest people. They have spent
12 decades bringing things to consumers that consumers have
13 come to love. They have been wronged with respect to
14 this chip. This case is about what the Defendants did
15 on this chip. Don't lose sight of the issues in the
16 case on account of Defendants' false arguments.

17 Frito-Lay has been wronged by Defendants,
18 and we're going to be asking you to make it right.

19 Thank you very much.

20 THE COURT: Thank you, sir.

21 Okay. At this time, we're going to go
22 ahead and take our morning break, and then we'll come
23 back and you'll hear the opening statements from the
24 Defendants.

25 I will repeat the same instruction you're

1 going to hear me say all the time. Please, again, don't
2 discuss the case among yourselves or anybody else, and
3 go ahead and take about a 10- or 15-minute break, and we
4 will come back and hear the opening statements from the
5 Defendants.

6 Thank you.

7 COURT SECURITY OFFICER: All rise for the
8 jury.

9 (Jury out.)

10 THE COURT: Be seated.

11 Okay. We need to take up -- your side
12 we'll note that you used a little more than an hour and
13 35 minutes, but the Court wasn't -- I wasn't timing
14 that. I don't want to slight the Defendants on its time
15 either.

16 MR. HILL: Just one question in that
17 regard, Your Honor. When we get back in 15 minutes,
18 I'll have an hour and 15 minutes before we get the lunch
19 break. I expect that will be adequate, but I need to
20 finish off two or three minutes after noon. I hope the
21 Court will give me that indulgence before we just hit a
22 hard stop.

23 THE COURT: No, I'm going to stop you
24 right at noon. No, I am user-friendly. I will give you
25 plenty of time. So we'll go until you finish your

1 opening statement, and then we will adjourn for lunch.

2 Anything else we need to take up

3 Gentlemen, Ladies?

4 MR. DURST: No, Your Honor.

5 COURT SECURITY OFFICER: All rise.

6 (Recess.)

7 (Jury out.)

8 THE COURT: Okay. Bring the jury in.

9 Mr. Hill, are you going to be doing the
10 opening?

11 MR. HILL: Yes, Your Honor.

12 THE COURT: Are you going to be standing
13 at the podium, or will you be walking?

14 MR. HILL: I'll be moving, Your Honor. I
15 have the microphone on now.

16 THE COURT: Okay. Very good.

17 COURT SECURITY OFFICER: All rise for the
18 jury.

19 (Jury in.)

20 THE COURT: Please be seated.

21 The Defense will give their opening.

22 MR. HILL: Thank you, Your Honor.

23 May it please the Court, counsel.

24 Ladies and Gentlemen, thank you again for
25 being here this morning. I know we're imposing on your

1 time, as we discussed yesterday, and I'm going to tell
2 you every day I get a chance that we appreciate your
3 service and thank you for being here.

4 If you strip away the allegations in this
5 case and you focus on the actual facts, the evidence
6 will show that this case is about three basic things:
7 \$4 versus \$2, American free market competition, and
8 consumer choice.

9 As we discussed in my voir dire, my name
10 is Wesley Hill. I'm proud to have a chance to defend
11 Medallion and Ralcorp against the allegations that have
12 been made against them in this case, because those are
13 just that: Allegations. They're not proof; they're not
14 evidence. What you're about to see is some of the
15 evidence.

16 Let me tell you a little bit first about
17 Medallion and Ralcorp. As we discussed a little in voir
18 dire, these are companies that are based on the idea of
19 giving consumers choice and fair prices.

20 We make store brands. We all know what
21 those are. We see them every day in grocery stores,
22 pharmacies, side by side on the shelf. They're packaged
23 similarly. They're made to perform similarly.

24 The idea of a store brand is to emulate a
25 name brand. If you don't sufficiently emulate, you are

1 not an adequate store brand. You're not an adequate
2 substitute. That is the nature of the business.
3 There's nothing wrong with that. There's nothing
4 nefarious about that in any way. It's something
5 Medallion and Ralcorp do well and we do proudly, and
6 we're not ashamed of it.

7 It's also something that brands like
8 Frito-Lay often even do themselves. They have
9 competitors, and they know they have to compete, and
10 they know when a successful product hits the market, if
11 they want into that market space, they have to compete
12 with them with a similar product.

13 The evidence will show you in this case
14 that in 2009, Ralcorp and Medallion decided to pursue
15 making bowl-shaped tortilla chips, and we were doing it
16 to compete with Frito-Lay's Tostitos SCOOPS!. No secret
17 about it.

18 Frito-Lay is the Goliath of the chip
19 business with roughly 60 percent of the U.S. snack chip
20 industry. They charge a premium price for their
21 Tostitos SCOOPS! product.

22 Frito-Lay's own documents will show you
23 that they consider their SCOOPS! product their Holy
24 Grail. I'll show you one of those documents now,
25 because I want you to see evidence in this case.

1 Jack, can we see Defendants' Exhibit 213.

2 Excuse me, folks. There we go. Wrong
3 input. There we are.

4 This is Tostitos, a PowerPoint
5 presentation produced by Frito-Lay in this case from
6 their own files.

7 Let's go to the third page of that. Blow
8 up that top end so the folks can see it.

9 SCOOPS! is what they consider their Holy
10 Grail. And why do they consider it that? Because it's
11 profit-enhancing and because they view it as being
12 competitively insulated.

13 Their witnesses have told us this.
14 There's no secret about it in this case. Let's look at
15 a clip of the deposition testimony from one of
16 Frito-Lay's witnesses, Ms. Anderson.

17 (Video playing.)

18 MS. ANDERSON: Certainly SCOOPS! has been
19 a component of many, many of the advertising campaigns
20 over the years because it's kind of our crown jewel in
21 the Tostitos portfolio.

22 (End of video clip.)

23 MR. HILL: And, folks, what Frito-Lay's
24 goal with Tostitos SCOOPS! is, is to get consumers to
25 pay a premium price for that product all the time.

1 We've got documents that show that.

2 Let's take a look at Defendants'
3 Exhibit 63 -- 263. This is, again, a Frito-Lay's
4 internal document, and if we flip through this document,
5 we are looking specifically -- keep going there, Jack.
6 Keep going. Is that it?

7 All right. Maybe I pulled up the wrong
8 document. We'll get that one, and I'll show it to you
9 in just a second.

10 But Frito-Lay's goal is to get you, the
11 consumer, to pay the premium on a product at all times.
12 That's what they're after.

13 We've got this document, Defendants'
14 Exhibit 263. I will show it to you at an appropriate
15 point in the case where you get a chance to take a look
16 at it. That's what they say they're after.

17 They're looking for consumers to pay the
18 premium at all times, because they recognize they have
19 what they consider to be a premium, high-end product,
20 and they want to maintain that exclusivity and that
21 price point.

22 You'll learn that their profit margins
23 ever since their launch in 2001 with SCOOPS! has been
24 among the highest on the SCOOPS! product. And you'll
25 learn that they've had no serious store brand

1 competition ever since 2001.

2 And, you know, Mr. Durst showed you
3 earlier all the various products that store brands
4 compete with with Frito-Lay and draws out that they
5 didn't sue anybody claims on any of these other store
6 brands.

7 Well, the store brands and other ones
8 aren't the Holy Grail. They aren't SCOOPS!. They
9 aren't their highest profit margin product.

10 So what did Medallion do? Let's talk
11 about that. It began a project internally that it
12 called Project Backhoe. And that project was to
13 determine whether it could fairly make and compete with
14 the bowl-shaped chip of its own, one that would share
15 SCOOPS!' functional aspects but offer consumers a lower
16 price, store brand choice, while respecting Frito-Lay's
17 intellectual property rights.

18 Let's take a look at Plaintiff's
19 Exhibit 32. Mr. Durst showed you this earlier. This is
20 one of the launch documents internally in Medallion when
21 we were looking at Project Backhoe, the initial stages,
22 when it was still just an idea.

23 Let's go to the next page.

24 This is what Mr. Durst showed you. He
25 points to this as if we are ashamed of the fact or

1 there's some mystery that this was a product emulation
2 process. There's not. This is what we set out to do.

3 Let's go to the next page.

4 We were assessing Frito-Lay's market
5 share and the opportunity that existed in this product
6 line because there was no competition for this product.

7 Let's keep going.

8 We looked at what we knew based on
9 existing processes that we had in our plant -- again,
10 Medallion has been making chips for almost 30 years --
11 and what we would have to learn or develop to be able to
12 make a bowl-shaped chip. So we were doing what we had
13 to do, and we knew what we had to research and develop.

14 Let's keep going.

15 We set up a feasibility study. What's
16 the first thing we did? We did a legal review. We
17 wanted to do this right, because we're in the business
18 of lawful competition, not stepping on other companies.

19 It does us no good to try to infringe
20 someone else's intellectual property. That's not our
21 game. That's not what we're after. It's not what we've
22 been doing for 30 years.

23 There's our feasibility timeline.

24 Let's keep going.

25 There's the timing that we had on our

1 development process, our goals. We didn't meet all
2 those goals. It took longer than we expected.

3 Let's go one more.

4 And here's the new developments section
5 where we're discussing some of these things.

6 Can we highlight the first two bullet
7 points there, Jack?

8 So we recognized at the very beginning of
9 this process that the patent search had uncovered
10 limitations on how we could form the bowl shape. But we
11 had two ideas of how we could do it without infringing
12 anyone's patents. We were designing around patent
13 rights, because that's lawful and that's legal
14 competition.

15 Now, Medallion assembled a team of its
16 employees to tackle this project. The team included
17 engineers, product development folks, plant managers,
18 people with dozens of years of chip-making experience,
19 something Medallion has been doing for 30 years.

20 Now, several of the team members
21 previously worked at Frito-Lay. Let me address that for
22 a second, because you're going to hear a lot about it in
23 this case.

24 Like any smart employer in a specialized
25 business, Medallion looks for employees with industry

1 experience. There's no shame in that. It's something
2 Frito-Lay does. It's something any good business in a
3 specialized industry will do.

4 It's because -- is it because we're
5 trying to rip people off? No. It's because we're
6 trying to hire folks that know about what they're doing,
7 that are familiar with the industry and the processes
8 that are necessary in that industry.

9 The universe of employees for the
10 specialized industry of tortilla-making is actually a
11 pretty small world. Frito-Lay is 60 percent of the
12 market, so you necessarily are going to find many
13 tortilla chip industry folks that have work history at
14 Frito-Lay. It's the nature of it.

15 Now, back to our team a little bit. The
16 team consisted of Andy Westervelt, Rusty Karschner, Tim
17 Bender, Scott Allen, Woody Guinnip, and Kent Vickery.

18 You'll get to meet and hear from many of
19 these folks.

20 I know Mr. Durst showed you some not too
21 flattering pictures of several of them that were video
22 captures from their depositions. You're going to get to
23 see much more of those people and what they have to say.

24 The team studied the SCOOPS! chip,
25 studied the publicly available information about how to

1 make a bowl-shaped chip, studied Frito-Lay's patents,
2 Frito-Lay's trademarks to make sure we didn't step on
3 any of Frito-Lay's patent rights or trademark rights,
4 and we independently developed a better way to make a
5 bowl-shaped competing tortilla chip. That's our BOWLZ
6 or CHIPZ products.

7 Now, from the very beginning of the
8 process, we consulted with our attorneys, and we studied
9 Frito-Lay's intellectual property, because Frito-Lay had
10 told the world what their inventions were. They had
11 told the world their process for making these chips in
12 their published patent applications. It was no great
13 mystery.

14 It took us over three years and
15 \$10 million to invent, build, and launch our BOWLZ line.

16 Let me show you Defendants' Exhibit 144,
17 Page 2 of this -- this is Page 2 of that document. This
18 is a breakdown, estimates of cost that we spent. You
19 can see the numbers totaling well over \$10 million that
20 we invested in the development of our process and lines.

21 Let me also show you Defendants'
22 Exhibit 200-7. This is a short video of a pilot system
23 we built, a prototype, as we tried to perfect a way to
24 properly, legally make bowl-shaped tortilla chips.

25 (Video playing.)

1 MR. HILL: See that small line -- it's
2 not real big -- production line, that's what we were
3 doing. We were tinkering, trying to find a way we could
4 develop and make these chips.

5 And you know what? We found one, a legal
6 one, a lawful one that has nothing to do with patent
7 rights or the trademark rights or the trade secret
8 rights that Frito-Lay tries to bring in this case.

9 (End of video clip.)

10 MR. HILL: Now, our chips finally began
11 hitting stores in January of 2012, about a year ago, and
12 initially, our only customer was Walmart, who sold the
13 chips under their BOWLZ trademark.

14 Here's a bag of them (indicating),
15 Walmart BOWLZ. Walmart owns the trademarks that are on
16 that bag. You see their Great Value brand, which is all
17 their store brands, and then their BOWLZ trademark.

18 Now, after a few months, Kroger also
19 became a customer selling our chips. Here's the Kroger
20 bag. This is what Kroger has as their bag (indicating),
21 same chips sold with the Kroger logos and brands.

22 So what did Frito-Lay do? They finally
23 had competition. Our chips are about \$2 a bag; theirs
24 are around 4.

25 They sued us right here in federal court

1 in Sherman, not because they knew we had done something
2 wrong, not because they knew anything about our process
3 or how we developed it when they filed their lawsuit;
4 they sued us because they're Frito-Lay. They're the big
5 kid on the block, and we had the gall to compete with
6 that Holy Grail crown jewel, and so this is where we
7 find ourselves.

8 So what did Frito-Lay accuse us of last
9 February when they filed suit? We started making the
10 product in January. We were sued by February. They
11 accused of us infringing their '344 patent. That's what
12 you've heard about already.

13 That patent covers a very specific
14 alignment system that Frito-Lay uses to make their
15 SCOOPS! chips, the alignment system. That's all it
16 covers that's at issue in this case.

17 We knew about their patent. We
18 intentionally don't use such a system. Of course,
19 Frito-Lay had never seen our process when they filed our
20 lawsuit, but that didn't stop them from making the claim
21 anyway.

22 Two, they accuse us of violating what
23 they say is a trade dress on their bag, and we'll show
24 you the bag. We'll get into that, because it's not the
25 bag of chips you see today. It's a bag they were making

1 a year or so ago. So we want to make sure you know
2 exactly which bags to compare.

3 And they say we were violating a
4 trademark of theirs, an issued mark, the '278 trademark.
5 We're going to show you that, and we're going to talk
6 about it.

7 And they say that their trademark is on a
8 bowl-shaped chip and that our bags and chips are causing
9 consumer confusion.

10 They made this claim despite the fact
11 that the bags look different, despite the fact that the
12 bags are plainly labeled, as you can see, and despite
13 the fact that the chips look different. Notice no one
14 has put chips in front of you yet, both chips. We're
15 going to do that here in just a little bit.

16 Now, all of these things make consumers
17 recognize that these products are different, but what
18 they're telling you is that you, the consumer, can't
19 distinguish them, that when you go in the grocery store,
20 you get tricked.

21 We challenge that. We think everyone
22 that goes in a grocery store recognizes the difference
23 between store brand and name brand, and we think there's
24 no confusion going on between these products.

25 Now, after the case had been progressing

1 for about six months and the patent and trademark claims
2 weren't looking so hot, Frito-Lay added a new claim.
3 They decided, you know, maybe it's not our IP rights.
4 You must have stole them from us. You stole our trade
5 secrets.

6 They called us thieves. They have pled
7 in their complaint that we violated Texas criminal law
8 and that we are thieves, third-degree felony in Texas to
9 steal a trade secret. They've made that allegation.
10 They base the claim on e-mail and documents that we gave
11 to them in this lawsuit where our employees discuss what
12 they legally know from public information, from fair
13 investigation, and from industry experience about
14 Frito-Lay's processes.

15 And they also show you the e-mails where
16 we're trying to show how to make our process different,
17 and they claim that's proof of theft of a trade secret,
18 because we assembled industry information and did
19 something different.

20 And they use Kent Vickery as the patsy
21 for this. You heard a lot about Mr. Vickery, pointed at
22 him with a laser pointer quite a bit talking about him,
23 because he's the only management-level employee at
24 Medallion that ever worked on the SCOOPS! line while he
25 was at Frito-Lay.

1 They mentioned these other folks, saying
2 they had Frito-Lay experience. They had -- 10, 15 years
3 ago had Frito-Lay experience. Vickery is the only one
4 that saw the SCOOPS! lines, and so he's their patsy.

5 And therefore, because we're competing
6 with them, we must have stolen trade secret
7 informations -- information, even though our process is
8 different in all the ways that matter.

9 So, you know, as fair-minded people, you
10 ought to be asking yourself right now: Hang on, Hill.
11 How do we know that's the truth? Frito-Lay is telling a
12 completely different story. You're telling us what you
13 say is the other side. How do we know it's true?
14 The reason you're going to know it's true is the
15 evidence you're going to see in the courtroom this week.

16 We want to show you the facts, because
17 the facts in this case demonstrate, we think clearly,
18 what's going on here.

19 You'll know because the evidence will
20 show you that the '344 patent claims do not read on our
21 process. We're going to go through it in detail in just
22 a moment, why that is.

23 You'll know that we do exactly what
24 Frito-Lay told the Patent Office when they were trying
25 to get that patent, that they weren't claiming as their

1 invention. But now that we're in the courthouse, they
2 want to recut that deal. You'll know, because you'll
3 get to compare the bags in this case and the chips
4 themselves and let your own eyes be the judge.

5 You'll also note that the chip in this
6 case that they claim is a trademark, that they claim as
7 trade dress, is a functional product.

8 And you'll know what Judge Mazzant has
9 already told you a little bit of and will tell you more
10 about, that it's the overall -- overall a product is
11 functional, product design is functional. You can't
12 protect it with a trademark, because that's the province
13 of the patent laws. That's what a patent is about.

14 If you want to protect the functional
15 aspect of a product, you have to get a patent on it.
16 It's a much more rigorous process where they look to see
17 if it's new and novel and a lot of other things. You
18 can't stretch a trademark around a functional feature,
19 and if you do, it's a misuse of the trademark.

20 The Judge will instruct you on the law on
21 that. We're going to talk about some of it here in a
22 minute, but that's what you'll see.

23 And finally, you'll know from the
24 evidence we show you that we didn't take any trade
25 secrets of Frito-Lay. We didn't steal the secret

1 formula. The fact that Frito-Lay calls publicly
2 available information and industry experience
3 confidential information, the fact that they label it as
4 such, doesn't make it so.

5 And what it especially doesn't make it is
6 a legally protectable trade secret. That is a defined
7 term that the Judge will instruct you about what it
8 means, and they have to show you that what they're
9 claiming is a legally protectable trade secret. And we
10 don't think they get there.

11 And when you separate the industry
12 experience, the standard industry equipment in
13 Frito-Lay's plants, and you separate also the
14 interworkings of their plants that they have actually
15 shown on national TV -- we're going to show you some TV
16 programs -- you'll get to see that what Frito-Lay claims
17 is a trade secret in this case isn't a secret at all.

18 Now, I want to show you the evidence on
19 each of these claims. I want to walk through it right
20 now first thing so that you know right now what we think
21 you're going to know conclusively at the end of this
22 case, that this case is about \$4 dollars versus \$2.

23 First, let's talk about the patent
24 claims. Frito-Lay asserts its '344 patent in this case.

25 And, Your Honor, the '344 patent is in

1 evidence as Plaintiff's Exhibit 2. I'd like to publish
2 a copy of it to the jury at this point for reference.

3 MR. DURST: No objection.

4 THE COURT: Go ahead.

5 MR. HILL: There's 10 copies of the
6 patent, if you would pass it down.

7 Jack, let's go ahead and put up
8 Plaintiff's Exhibit 2. Pull out the top quarter there.
9 All right. That's good.

10 All right. Folks, this is the '344
11 patent-in-suit. That's what Frito-Lay is suing us on.
12 You'll see there on the cover of the patent there's the
13 name of it, the title for the patent.

14 And it doesn't cover just making any
15 bowl-shaped chip. Frito-Lay will never tell you that.
16 It just claims a specific process.

17 And we know that because the patent
18 claims, as the video told you yesterday, are kind of
19 like the property description in a property deed. It
20 gives you the metes and bounds of their invention.

21 And so we're going to be focused on the
22 claim language in this case and applying it to our
23 accused process. So I want to show you what Claim 1
24 says.

25 If you will flip through the patent to

1 the 12th page there -- I think there's 14 pages total,
2 and it's Page 12.

3 Go ahead and bring up Claim 1.

4 You can see there it's in Column 8.

5 You'll notice as we go through patents in this case,
6 they're numbered at the top by column. See the column
7 numbers there? And what I'm looking at is at Column 8,
8 and it's down here around Line 55. There's little line
9 numbers down the center margin.

10 And here's what the claim says, and
11 here's what is at issue in this case. The claim says
12 what is claimed: A process of making a snack chip
13 comprising sheeting a dough into substantially flat
14 pieces, feeding the substantially flat pieces at a feed
15 speed onto an alignment belt -- all right. Let's stop
16 right there.

17 See that word alignment belt? What does
18 that mean? Well, lucky for us, Judge Mazzant has
19 defined these terms for us. This is part of the Court's
20 claim construction order that you're going to hear about
21 in this case.

22 It will be a part of your charge, and
23 you'll get a glossary of this sort with these terms and
24 others where they are defined in the patent so that you
25 know what these terms mean, because those are legal

1 questions that the Judge has given before we start the
2 trial.

3 So an alignment system, an alignment belt
4 in particular, is a belt on which uneven rows of pieces
5 are ingested into essentially even rows, okay? That's
6 how we know what an alignment belt is.

7 Let's go on through the claim. And it
8 says: Adjusting positions of the substantially flat
9 pieces on the alignment belt -- so we're adjusting the
10 position of these pieces on the belt -- with an
11 alignment system -- all right. There we go again.

12 There's another defined term Judge
13 Mazzant gives us.

14 And he tells us that's a system
15 positioned after the sheeter or cutter -- after the
16 sheeter or cutter, and that's going to become important
17 in a second -- for moving pieces in a row with respect
18 to one another.

19 Do you see that? Moving pieces in a row
20 with respect to one another -- along an intentionally
21 straight line -- excuse me -- along -- with respect to
22 one another so that the pieces in each row are
23 positioned along an essentially straight line and to
24 align the essentially straight line of pieces for
25 molding.

1 All right. That's patent lawyer speak.

2 Let me tell you what that's talking about.

3 So if we have a row of pieces -- you
4 know, there might be multiples of them here. These are
5 those little round pieces that he was showing you in the
6 alignment system, and they're trucking down the conveyor
7 belt. This is a row, okay?

8 And what they're telling you is that we
9 have to have an alignment system that moves those pieces
10 with respect to one another. Do you see that? Move the
11 pieces in each row with respect to one another.

12 Here's a row, and we have to move the
13 pieces in each row, right here, with respect to one
14 another. So this piece has to be moved in relation with
15 that piece, where this one, where this one, something in
16 the same row.

17 So, basically, what we're doing is, we're
18 taking these pieces that aren't in a perfectly straight
19 line, and we're -- we're pushing them up, okay? We're
20 bringing them up so that when we're done, we have
21 something that looks more like that (drawing on board).

22 So we're taking pieces in a row, and
23 we're aligning them with respect to one another to form
24 an essentially straight line.

25 See it again. Perform essentially even

1 ranks to move pieces in each row with respect to one
2 another so that the pieces in each row or position fall
3 in essentially a straight line and to align the
4 essentially straight line of the pieces for molding.

5 That's what aligning the system tells us
6 about, that we're moving pieces in a row with respect to
7 one another for aligning rows and pieces for molding, is
8 what perform essentially even ranks, same concept, and
9 that's all part of the alignment belt and alignment
10 system, okay?

11 That's what the patent claims. That is
12 the metes and bounds of their invention.

13 Notice I'm the first one telling you
14 about it. It's their patent. You think, if we
15 infringe, they would be pretty proud of this invention.
16 It's so new and novel, they got a patent on it. I'm the
17 first one telling you, but I want you to see why that
18 is.

19 Now, here's a picture -- let's look at --
20 look at Page 3 of your patent, third page in. There's a
21 series of pictures. One of them is Figure 5.

22 Can we blow out Figure 5 there, Jack?

23 Okay. This is a picture that's showing
24 you an example from the patent. It gives you an idea of
25 what I was just trying to explain to you.

1 You see how those pieces in the row
2 aren't even? And you see those little nubs coming in
3 behind it? Those nubs are going to sure those things
4 up. It's going to true them up. Push it from behind
5 and true them up so that they're in a straight line
6 before they go to be molded. That's what the patent is
7 describing.

8 Medallion does not use this invention to
9 make our chips. I want to show you now our
10 manufacturing line.

11 MR. DURST: Your Honor, I object. I
12 think the Court has entered a ruling that's inconsistent
13 with what Mr. Hill is arguing. I'll be happy to explain
14 that or we can go to the side-bar.

15 The issue, Your Honor, is that he's
16 arguing that that is what the patent is limited to. I
17 think this is not the Court's ruling.

18 MR. HILL: Your Honor, I -- I'm sorry.
19 Go ahead, Your Honor. I didn't mean to interrupt.

20 THE COURT: Go ahead.

21 MR. HILL: I presented this as an example
22 from the patent, nothing more. And I presented the
23 patent claim language and the Court's claim
24 construction. I don't know what's misleading about
25 that.

1 THE COURT: It's overruled.

2 MR. HILL: Thank you, Your Honor.

3 I want to show you Defendants' Exhibit 43
4 now.

5 Okay. This is our manufacturing line.
6 What you see right here on the far left -- I want you
7 folks to get oriented to this, because I'm going to show
8 you a video of it in just a second. I want you to know
9 what you're looking at when you see it. And notice,
10 too, I'm the first guy showing you why, because I want
11 you to see the evidence.

12 Okay. This is our sheeter cutter, all
13 right? The dough comes out of this extruder here at the
14 top. It drops. That's a sheet of masa right there.
15 You can kind of see it. It drops into the sheeter
16 cutter.

17 There is a cutter roller in there,
18 flattens it out and cuts it into these pieces. Our
19 cutter roller cuts our pieces into straight lines from
20 the get-go. We don't have to align, because we cut it
21 right out of the sheeter cutter in a straight line.

22 And notice that if you look at the
23 definition of the alignment system, it says: A system
24 positioned after the sheeter cutter. That's where we
25 lined it up right there. We cut it in a straight line,

1 and that way we don't have to move it. Makes our
2 process better and cheaper.

3 Let's look at Defendants' Exhibit 27.

4 That is an up-close view of the guts of
5 that cutter. You see those little circles that are in a
6 straight line, that's what is cutting that dough into
7 those circles.

8 Let's look at Defendants' Exhibit 34.

9 There's another view of that cutter. You
10 can see those circles and how it cuts them into a
11 straight line.

12 Let's look at Defendants' Exhibit 28.

13 All right. So this is the end of our
14 sheeter belt as it's going down the assembly line, going
15 that direction, going toward the blue belt, and it dumps
16 our pieces off our sheeter belt onto this transition
17 belt that goes on down the line, all in a straight line.

18 Let's go to Plaintiff's Exhibit 3 -- or
19 324, Plaintiff's Exhibit 324 at 2984, Jack.

20 This is further down our line. You got
21 that blue belt coming off right there off the sheeter.
22 There's our blue belt and our straight line. There is a
23 transition point under that guard, and then we go to
24 another belt that carries them on down.

25 Now, let me explain something. Those

1 belts run at different speeds, and the reason they run
2 at different speeds is to separate those rows a little
3 bit as they go down, okay? Give them more -- to phase
4 them, give them more space in between them.

5 That isn't what the claim construction is
6 talking about. That's what Frito-Lay is going to try to
7 use as the power of suggestion to make you think we
8 infringe.

9 But when they do that, every time they
10 use the word alignment, or like Mr. Durst did earlier,
11 he points to a document of ours that says alignment in
12 it, look at whether he's using alignment as it's defined
13 in the patent, because he's not. That's just a document
14 that the people were working on that have everyday usage
15 of the word alignment, to align something.

16 Alignment in this case is a defined term
17 when you're talking about this patent. And if he's
18 using alignment in any way different than what the Court
19 has told you it means, something is afoot. Something is
20 going on. It's a moon-walking bear movie, okay?

21 So that's why I want to point out to you
22 about our alignment system, our alignment belts, our
23 transitioning. They want to call it an alignment system
24 that's under the terms of this patent. It is not. It
25 cuts them in a straight row, and we leave them in a

1 straight row.

2 All right. Let's look at Defendants'
3 Exhibit 47.

4 That is our belt in those -- the
5 transition belts spitting our dough out onto our oven
6 belt or mold belt. So what we do is, we shoot the
7 little flat pieces of dough over kind of what looks like
8 an upside down cup, okay? That's how we make our chip.
9 And then it goes from there on to an air blower, kind of
10 blows it down, and then it goes through a baking oven
11 and it bakes it into that shape, and then it gets dumped
12 into a fryer.

13 Frito-Lay uses a plunge and mold system.
14 They toast their chips. And that's why they get out of
15 alignment. They cut their dough, and they run it
16 through a toaster, and when they toast it up, it kind of
17 pops around, and they get out of shape -- they get out
18 of line.

19 So they've got to sure those things back
20 up before they try to shoot them onto an upside down
21 muffin tin essentially. And then they have a big
22 plunger that plunges it down, pushes it down in that
23 cup. And that's how they make their chip. Couldn't be
24 more different.

25 Here is a video of all of this in action.

1 Let's look at Defendants' Exhibit 201.

2 (Video playing.)

3 MR. HILL: There's our sheeter cutter.

4 You see the masa dough coming down, going into the
5 roller and the cutter. There's the actual cutter up
6 close as it's rolling that dough, cutting those pieces.
7 There are the pieces coming off the cutter in a straight
8 line. There are the pieces again up close, coming off
9 that cutter. There they're hitting the first belt.
10 That's a different view of that. There they are coming
11 on down the line, going through to the second belt,
12 still in those rows, right where they started. And then
13 there they are popping onto the oven rack at the end,
14 you'll see. That's our system. That's what they say
15 infringes their product, their patent.

16 You can stop it there, Jack.

17 (End of video clip.)

18 MR. HILL: Now, folks, when you look at
19 the Court's claim construction, when you look at the
20 patent claim language that you'll get to spend some time
21 with, what you see is that we do it different.

22 And why do we do it different? Well, we
23 do it different because we knew that that system didn't
24 infringe anybody's patent. We knew that was a way that
25 was in the public domain that we could sheet and cut

1 those pieces and move them from one end down to our oven
2 belt.

3 And the reason we knew that is because we
4 looked at what Frito-Lay itself had told the Patent
5 Office. We looked at the file history of that '344
6 patent.

7 You know, those two books that Mr. Durst
8 stacked up for you earlier, that is the back and forth
9 between Frito-Lay and the Patent Office to get this
10 patent.

11 And here's what they told the Patent
12 Office specifically, to overcome a rejection of that
13 patent. The Patent Office had rejected the claims, and
14 they said: No. Hang on. Don't reject it over the
15 prior art. It's different. And here's why.

16 Let's look at Plaintiff's Exhibit 296 at
17 320, Jack.

18 All right. This is the disclaimer.

19 Let's pull out the second paragraph down
20 past this inset part and the third paragraph. So I'm
21 looking at these two paragraphs right -- these right
22 here, Jack. Can you see that? There we go.

23 All right. So this is what they tell the
24 Patent Office: Contrary to the assertion in the office
25 action, Fink, that's the prior art, okay, it's the prior

1 art patent -- does not disclose an alignment system as
2 disclosed in the present application.

3 While applicant agrees that Fink
4 discloses that the chip preforms be aligned in rows
5 before they are conveyed to the mold plates, applicant
6 notes that Fink rely on the configuration of the cutter
7 roller to discharge the chip preforms onto the conveyor
8 in rows.

9 So they're telling us that's different.
10 That's not us. That's not what we're trying to claim.
11 Using the cutter roller to put them into even rows is
12 different. That's the prior art.

13 They go on. Thus, according to Fink,
14 alignment of the chip preforms relies upon the
15 configuration of the assembly responsible for the
16 sheeting and cutting of the chip preforms. The chip
17 preforms are deposited in rows directly from the cutter
18 onto the conveyor and conveyed onwards to the mold
19 plates.

20 After separation from the cutter, no
21 further manipulation or adjustment of the preforms to
22 form essentially even ranks is disclosed.

23 Well, that's what they told the Patent
24 Office, but that's not what they tell you. We relied on
25 what they told the public, and now they've sued us for

1 it anyway.

2 Here's a memo that Medallion's lawyers
3 wrote us about the Frito-Lay patent when we were first
4 trying to develop our system. I want to show it to you.

5 It's Plaintiff's Exhibit 153 at Page 10.
6 Bring up the first page first.

7 This is a letter from one of our
8 attorneys.

9 If you'll bring out the heading there.

10 Regarding Project Backhoe before we
11 launched our product.

12 And now let's go to Page 10. And let's
13 blow out the portion that starts there in the middle of
14 the page, importantly, right through here and come on
15 down, all the way down to the bottom. All right.

16 And, folks, if this is hard to see -- I
17 know it's a long way to look to see something. I
18 apologize. We'll try and get a monitor closer to you to
19 help with that.

20 So our lawyers told us when we were
21 working on this project, the '344 patent, the following
22 argument was presented to the Patent Office to
23 distinguish it from the prior art and was relied upon by
24 the Examiner to reject the claims.

25 Well, there's the section from the prior

1 art we just read, the section from the prosecution
2 history we just read.

3 Here's what our lawyers went on to tell
4 us: The backhoe method is similar to the prior art, as
5 characterized by the applicants during the prosecution
6 of U.S. '344 patent, and thus is substantially different
7 from the claimed invention.

8 The flat pieces are deposited from the
9 sheeter on the conveyor belt in aligned rows in the
10 backhoe method and are subsequently transferred to a
11 second belt referred to as a transfer belt that carries
12 them to the molding machinery in the backhoe system.
13 So he's talking about what we do.

14 He goes on. The transfer belt operates
15 at a different speed than the conveyor belt to produce a
16 desired spacing between the rows in the backhoe system
17 method, but the rows themselves are not adjusted on
18 either the conveyor belt or the transfer belt.

19 The pieces of dough never move relative
20 to the belts once placed on the belts in the backhoe
21 system method. But there is no need for a, quote,
22 alignment system, as recited in Claims 1, 16, and 18 of
23 the '344 patent.

24 The rows deposited by the sheeter are
25 sufficient for the backhoe system method. There's no

1 alignment system to, quote, form even ranks in the
2 backhoe system.

3 Never been there, and it ain't there
4 today. We don't infringe the patent. But we got sued
5 for it. Because when Frito-Lay was faced with
6 competition, they do what they do best: Hype and
7 marketing.

8 They'll point to every document we have
9 that uses that general term alignment, and every time
10 they point to one, ask yourself: Is that what the Court
11 says it means? Is that what they told the Patent Office
12 it means? That will prove to you this case is about \$4
13 versus \$2.

14 Now then, let me mention one thing
15 Mr. Durst raised. He talked about Wolverine and
16 Reading, saying those were two stop signs we ran, these
17 two vendors we deal with, who, when we first started
18 wanting to make the process, didn't want to help us.

19 Well, do you know what happens to you if
20 you help somebody that Frito-Lay doesn't care for? And
21 Reading, let's talk about them. That's who actually
22 built our system. So \$4/\$2.

23 Now then, let's talk about the trade
24 dress and trademark.

25 First, the trade dress claims.

1 Let me see Defendants' Exhibit 71, Jack,
2 if we can.

3 All right. That's the bag that this case
4 is all about, that one right there. No other SCOOPS!
5 bag, not their new one. This is the bag they're using
6 now, okay? That has nothing to do with anything as far
7 as trade dress, except to show you the fact that this,
8 you know, famous consumer identifying trade dress they
9 claim they developed in that bag was so famous to
10 consumer identifying that they don't use it anymore.

11 Trade dress infringement requires a
12 comparison of the bags. So the comparison you have to
13 make is that bag and this bag (indicating), okay?

14 That's the comparison. I'm just going to
15 leave this over here.

16 Now, Frito-Lay is claiming that the color
17 scheme of this bag all by itself has become so
18 significant in the public's mind that when people see
19 this dollar scheme, they automatically think Frito-Lay.
20 That's their claim. They have to make you believe that
21 to win this case.

22 Let me tell you something. Go up and
23 down the chip aisle. It's full of blue bags with clear
24 windows, full of them. Blue bags with clear windows
25 with bold lettering on them. It's full of them.

1 Frito-Lay claims there's a likelihood --
2 that's what they have to prove it -- a likelihood -- not
3 a chance, a likelihood that people are confused by this.

4 Basically, they're saying that you, the
5 consumer, isn't bright enough to look at that bag and
6 look at this bag and know there's a difference. Do you
7 buy that?

8 Clear branding, different look, 2-dollar
9 price difference. See, their bag says 3.99 on the side.
10 You really think folks are mixed up? Your eyes tell you
11 all you need to know about this claim, folks, on this
12 trade dress of this bag. I'm not going to belabor it.

13 They will bring an expert witness in here
14 from Purdue University who's going to come and get you
15 to believe what they want to tell you they -- what they
16 want you to see. The power of suggestion is what it is.
17 I want you to use your common sense and your own two
18 eyes. Look at those two bags and decide if you think we
19 did something wrong.

20 Now, let's turn to the only registered
21 mark they have in this case. It is the Plaintiff's
22 Exhibit 1.

23 Let's take a look at that, Jack.

24 This is the trademark that they have on
25 that chip. Take a good look at it there. I want to

1 show you now an actual scoop, a bag of Tostitos SCOOPS!
2 purchased recently. I'm going to hand them to you. I
3 want y'all to look at them. Y'all look at them. Take
4 them out. You can have the whole bag.

5 Now, as y'all get a chance to look at
6 those, ask yourself something. Do those chips look like
7 that trademark? Those chips, every one of them is
8 different. They're like snowflakes in that bag. It's
9 hard to find two that are even close to alike.
10 That's why they say they abandoned the mark that Mr.
11 Durst called such a silly argument, is because their
12 process control is so lax that they try their best, but
13 despite those efforts, they don't make that 8-fluted
14 chip that's in their mark. They make something else.
15 So they're not using that mark.

16 But they have a problem with that
17 trademark beyond the look of it, beyond the fact that
18 they can't even get it there.

19 You know, that's another thing, going
20 into the functionality, he said that shape and function
21 are both important. Well, they are both important.
22 The only thing they're able to keep consistent about
23 those chips is not the shape; it's the function.

24 Because, again, pour them out in a bowl
25 and look at them. All the shapes are different. The

1 only consistency is the function.

2 And that's the problem with this mark, is
3 that it's functional. And you cannot use a trademark to
4 protect a functional design. You can't do it. It's
5 against the law. Because like we talked about earlier,
6 that gets you into the world where you've got to have a
7 patent to protect something. That's what they're trying
8 to do in this case.

9 How do we know it's functional? You
10 know, the Court's going to give you instructions on
11 functionality. Gave you some of them yesterday.

12 How are you going to assess it? He's going to
13 tell you a lot more.

14 If the camera is on, see if it's going to
15 cooperate.

16 All right. That's what the Judge told
17 you yesterday in the preliminary instructions. Trade
18 dress that is functional under the law is not protected.
19 The determination of whether something is functional is
20 made by considering the trade dress as a whole.

21 Did he say break it down into individual
22 elements?

23 No. He said consider it as a whole.

24 It's functional if it's essentially used
25 for the purpose of the article or it affects the cost or

1 quality of the article. Then it's functional.

2 The only consistent feature about those
3 chips that distinguishes them from a flat chip or from
4 any chip is their function. How do we know that?

5 Here's the evidence, but, again, I want
6 you to see the evidence, not allegations. Frito-Lay
7 tells us that first in their advertising.

8 Sorry. Thank you, Mark.

9 Let's look at Defendants' Exhibit 76.

10 (Video clip playing.)

11 MR. HILL: Advertising shape and
12 function.

13 Let's look at the next one.

14 (Video clip playing.)

15 MR. HILL: We know it because Frito-Lay's
16 documents tell us that it's functional.

17 Let's look at Defendants' Exhibit 204.

18 This is another internal Frito-Lay
19 PowerPoint. Let's look specifically at Page 6.

20 Blow up the top two bullet points there.
21 There you go.

22 The first bullet point: Both users and
23 non-users believe the primary benefit of SCOOPS! is a
24 dip-carrier. Folks, that's not the only document like
25 that. I've got a list of them, but in the interest of

1 time, we'll show them to you as the trial goes on.

2 And finally, the thing that just ought to
3 make you scratch your head, Frito-Lay tells us in that
4 patent you've got in your hands that this design is
5 functional. In the patent that they're suing us on in
6 this lawsuit, they tell you about the functionality of
7 that chip.

8 And if we look specifically at Page 9 of
9 the patent that you have --

10 Jack, can we go back to Plaintiff's
11 Exhibit 2, Page 9.

12 Folks, if you look at Column 1 -- or
13 excuse me -- yeah, Column 1 of the patent, Page 9,
14 Column 1, Line 35 to 45.

15 Can you draw that out?

16 They tell us about it. I'll start here
17 in the middle of the paragraph. The utilitarian shapes
18 known include, for example, ridges, scoops, taco-shaped,
19 spoon-shaped, and bowl-shaped of these. Of these, a
20 bowl-shaped chip is particularly desirable as it has a
21 retaining wall or edge surrounding the entirety of the
22 chip.

23 The earlier portion of that paragraph
24 I'll let you read for yourself. It talks about the
25 functionality of it too. It allows you to scoop up a

1 desired portion without losing it.

2 Then let's look at Figure 2 on Page 2 of
3 the patent. Second page of the patent. We'll look at
4 Figure 2 this time.

5 This is a picture from the patent, the
6 utility patent. Does that picture look familiar to you?

7 Can we show Plaintiff's Exhibit 1 again,
8 Jack?

9 Does that picture look familiar to you?

10 That's the very picture they use in the
11 example in the utility patent describing the
12 functionality, and they describe that functionality
13 again in the patent at Page 12.

14 If we go back to Exhibit 2 and we go to
15 Page 12, Column 7, Line 30 to 33, what do they tell us
16 about it?

17 Well, they're talking about that picture.
18 They're talking about 204. That's the little number on
19 the picture, pointing to Figure 2. And it says fluted
20 edges 204 allow for a point of entry and easier dipping
21 of the finished chip. So there the fluted edges have a
22 function, too.

23 Ornamental? That's not what they say in
24 the patent. That's not what they say in their
25 advertising. It's not what they say anywhere but in

1 this courtroom to you.

2 Why? \$2, \$4, that's why.

3 You know, folks, there's one interesting
4 thing here about that, and it's that, you know, this
5 patent we're looking at and that trademark, those were
6 at the Patent Office at the same time. And if you look
7 at the prosecution history of the '278 mark, you know
8 how many references are in there to the '344 patent?

9 Zero. Zero. So they tell the patent
10 division one thing. They tell the trademark division
11 another. And they get what you're going to learn
12 basically to be a, quote, competitively insulated
13 product.

14 Folks, it comes down to \$2 versus \$4. We
15 knew about this trademark when we started making our
16 chip.

17 Let's look at Plaintiff's Exhibit 421.
18 Plaintiff's Exhibit 421. This is an e-mail, internal
19 e-mail at Medallion.

20 You can blow out the top, if you would
21 like to, Jack.

22 Kent Vickery to Tim Bender discussing
23 prior art patents and things. You can see this is in
24 April of 2009. This is when we were just starting to
25 investigate.

1 Let's go to Page 3.

2 Bender -- let's look here at the bottom,
3 this section right in here (indicating), Jack.

4 I know that's small, but you'll get a
5 chance to see the document itself. It says: On a
6 separate but related note, we also conducted trademark
7 searches and found that Frito-Lay has a federal
8 trademark registration on configuration of this product.
9 And they -- there's the '278 mark noted. This presents
10 some interesting descriptiveness and functionality
11 issues. We recognized then they had a functionality
12 problem, but here's what we said:

13 But if it can be conveniently done, it
14 might be easier to make the product look different
15 rather than contend with the issues of validity and
16 infringement of the trademark.

17 You know what we did? We took our
18 lawyers' advice.

19 I want to show you our chips. Take them
20 out and look at them. You had the Frito-Lay chips. Get
21 some of theirs and look at them, if you want to, again.
22 You tell me that those chips -- let's look at
23 Plaintiff's Exhibit 1.

24 Did we succeed? Did we make a chip that
25 looked different from their trademark?

1 Again, I won't belabor it. I want your
2 own eyes to be the judge. Did we make a chip that looks
3 different from that trademark? Compare it with your own
4 chip, if you want to.

5 Folks, our chips look different. We
6 followed our lawyers' advice. Frito-Lay didn't care.
7 That's because this case isn't about legitimate concerns
8 about the future. This case is about \$4 versus \$2.

9 Now, as you've seen, Frito-Lay's patent
10 and trademark claims, we think, don't hold water. And
11 we think it shows their true motive of eliminating their
12 only serious bowl-shaped chip competitor, protecting
13 that Holy Grail.

14 But, listen, Frito-Lay is a smart
15 company. They're in the consumer-persuasion business,
16 okay? That's what they do.

17 So what do they do halfway through this
18 case? They come up with a storyline. Just like their
19 advertising campaigns, they hope that narrative will
20 carry the day in this courtroom instead of evidence.

21 They're hoping that that narrative about
22 theft of trade secrets will anger you so much that you
23 will tattoo us regardless of what the facts show. And
24 let me ask: What more inflammatory of an allegation can
25 you make against somebody than calling them a thief?

1 Accuse them of theft?

2 Everybody hates a thief. Well, you heard
3 from Mr. Durst how the story goes, but I think when you
4 look at the evidence, you might find it's a lot like the
5 trademark and the patent claims, a little different
6 story.

7 First let me make something clear. Not
8 even Frito-Lay alleges that we broke in their plant and
9 stole something; that we hacked into their computers and
10 took something; or that we had employees that took
11 documents from them and left with them and came to work
12 immediately for us. That's not any part of this case.

13 So here's how Frito-Lay cooked up its
14 story midway through this case.

15 In the northeast corner of Arkansas, the
16 top northeast corner right close to Tennessee, there's
17 two little towns with two chip plants. Frito-Lay is in
18 Jonesboro and Medallion is in Newport. These are both
19 relatively small towns, and as you might expect, kind of
20 like around here with Frito-Lay in Plano, they employ a
21 lot of people.

22 And as you might expect, people in the
23 same specialized industries, they sometimes change jobs.
24 If your skill is making tortilla chips and you live in
25 northeast Arkansas, the odds are you're going to work

1 for Frito-Lay or Medallion.

2 So out of our 300 employees, all the
3 discovery, all the hours and hours, weeks literally,
4 maybe months of depositions, hundreds of thousands of
5 documents that they scrubbed through for hours in this
6 case, out of all of that, they found two former
7 employees -- former Frito-Lay employees that were
8 involved in Project Backhoe. And they call them
9 thieves: Kent Vickery and Jackie Price.

10 They picked Kent Vickery, because he's
11 the only Medallion management-level employee that worked
12 on a Frito-Lay Jonesboro Scoops! line. They let him go
13 in 2006 after 25 years of employment, something you're
14 going to get to hear all about. I won't spend time
15 going into it right now.

16 When he left, they required him to sign a
17 severance agreement in exchange for six months'
18 severance pay and keeping his benefits for a few months.
19 That severance agreement contained the standard
20 confidential agreement. Notably, he did not sign an
21 agreement to forget 25 years of industry experience.

22 Mr. Vickery tried various jobs for the
23 next 14 months, looking around for other types of work.
24 And then 14 months later, in 2007, he applied for a job
25 with Medallion, and we hired him because he had 25 years

1 of industry experience.

2 They also picked Jackie Price, Jackie
3 Morgan. Her last name changed in the course of things,
4 presumably because she left Frito-Lay and came to work
5 for Medallion. Jackie Price is a high school graduate,
6 single mother of a 19-year-old college student. She
7 needs the best job she can get. She knew Kent Vickery,
8 and when he offered her a better position at Medallion,
9 she took it.

10 Pointing at these two employees as the
11 patsies, Frito-Lay gathered every e-mail they could find
12 in this case among Medallion employees, their
13 store-brand competitor, and now highlight every
14 reference to any mention of how Frito-Lay does anything,
15 and they claim it's a trade secret. And they claim we
16 obviously stole that information.

17 Well, folks, they're our chief
18 competitor, and we are in the product-emulation
19 business. Does it surprise anybody that we talk a lot
20 about what Frito-Lay does?

21 Does it surprise anybody that we focus on
22 how they do things?

23 They are our chief competitor. We stay
24 up on the competition. That's our business. Of course
25 we do that. But they've labeled Kent Vickery and Jackie

1 Price as thieves. That's a bold allegation. This
2 courtroom is not about allegations. It's about proof.

3 What Frito-Lay's theft claims ignore is
4 the legal term and the legal definition of the term
5 trade secret. A trade secret is not anything that
6 Frito-Lay unilaterally deems confidential. They can
7 label everything they've got confidential, and the fact
8 they label it that way and call it that way in their
9 house doesn't mean it's a trade secret at the
10 courthouse.

11 Common industry experience, publicly
12 available information, issued patents, things that can
13 be discovered through proper investigation,
14 reverse-engineering or inspection, none of that stuff is
15 trade secrets. And Frito-Lay knows it.

16 That's why they hired an expert in this
17 case. You're going to hear from Dr. Martin Okos to come
18 in and convince you that some of those things are trade
19 secrets and that we stole them.

20 Here's his report, Dr. Okos.

21 I don't want to stop your computer there,
22 Jack.

23 There it is (indicating). He had unfair
24 access to look at every document in this case, inspect
25 every inch of our production line, talk to our

1 employees, and review all the depositions, whatever he
2 wanted to do. And I'm not going to go through every
3 example of what's wrong with Dr. Okos' report. We will
4 do that if Frito-Lay has the guts to put him on that
5 witness stand.

6 But so that you can see the ease that
7 Frito-Lay accuses people of theft, only to call, you
8 know, King's X, not it, when the rubber meets the road.
9 Let me give you some examples of what Frito-Lay is
10 willing to call a trade secret in this case.

11 In addition to Dr. Okos' report, they
12 gave us a list of what they claim is a trade secret. I
13 want to talk about a few of those things.

14 First off, they say Frito-Lay
15 specifications, configuration and design and integration
16 of its corn-cooking, soaking, and washing equipment. So
17 corn-cooking, soaking, and washing equipment. You're
18 going to see a video in just a minute where they're
19 talking about a TV show. You will get to watch a TV
20 show. It will show you corn-soaking, cooking, and
21 washing equipment.

22 How Frito-Lay employees operate its
23 tortilla lines. That's a pretty broad subject. Does
24 that sound like a trade secret, how we operate our
25 tortilla lines?

1 You know, we've been operating tortilla
2 lines for 30 years. That TV show, let me show you a
3 little something about how they operate a tortilla line.
4 The amount of time that Frito-Lay has spent developing
5 SCOOPS! Mr. Durst told you a few minutes ago that was
6 seven years. Let's take a look at Defendants' Exhibit
7 153.

8 Can we blow out the text there in the
9 middle, right in the middle of the page?

10 Develop. This is a Frito-Lay press
11 release from the relevant time period following 18
12 months of development, Frito-Lay Food scientists
13 perfected the technically insulated form and fry
14 technique to create Tostitos SCOOPS!.

15 So they told -- they're going to tell
16 you -- they told us they're going to tell you at least.
17 We'll see if they've actually got the guts to do it --
18 that the amount of time Frito-Lay spent developing
19 SCOOPS! that Mr. Durst said was 7 years, was a trade
20 secret, number one, and on the face of the fact they've
21 got press releases telling you it's not 7 years; it's 18
22 months.

23 They're going to tell you that the
24 knowledge of the way that Frito-Lay makes SCOOPS!,
25 including the use of hot air, to dry chips during

1 molding is a trade secret. The use of hot air to dry
2 chips during molding, that's a trade secret.

3 Let's go back to Plaintiff's Exhibit 2.
4 That's your patent you've got in your hand, public
5 document. Take a look at Page 12. And we're going to
6 look at Column 7, Line 60. Column 7, Line 60.
7 What does the patent say?

8 Right here (indicating), once plunging is
9 complete and the chips are passed through a plunger and
10 mold conveyor, chips are conducted through a form dryer
11 while still retained within the molds. Form dryer is
12 optionally a multi-zone dryer to dry the chips.

13 It's in their patent. They're going to
14 tell you it's a trade secret. At least that's what they
15 told us they were going to tell you.

16 They also have something else in the
17 patent on Page 12. Look at Column 8, lines 16 to 19.
18 16 to 19. They claim it's a trade secret in this case,
19 the knowledge that an air assist is needed to remove
20 chips from the molds, they use air to blow the chip off
21 the mold, okay? They are going to tell you it's a trade
22 secret, because they saw it in looking at our plant.

23 That's something we did. Oh, that's a
24 trade secret.

25 Nobody else has sense enough to come up

1 with something innovative. What do they say in their
2 patent?

3 To release chips, molds open and
4 separate. To assist the release of the chips, an air
5 blower beneath mold rack belt can direct a stream of air
6 toward the bottom of the molds.

7 They are in the courthouse accusing us of
8 third-degree felonies for stuff that's in the patent.
9 It's not part of the patent claims. This is a
10 description of the background things and how you can do
11 stuff.

12 I do want to talk to you about one other
13 thing that they brought up as a trade secret. They
14 showed you Mr. Trowbridge and they talked about Quality
15 Fabrication and an inspection that our employees took to
16 inspect some industry equipment at Quality Fab. Quality
17 Fab makes corn washers and corn soaker-type equipment,
18 okay? It's common industry equipment.

19 Quality Fab wanted our business, and so
20 they wanted us to see the quality of the work they do,
21 so they invited us to come and inspect product they were
22 making. The product made by this company was
23 Frito-Lay's product. It's not how they make the chips.
24 It's a corn washer. There's nothing industry-specific
25 about it or proprietary about it.

1 Folks from Quality Fab will come and tell
2 you that. But they show you Mr. Trowbridge's
3 deposition, and they show you a snippet. They deposed
4 that man all day. I don't know if you noticed the time
5 on that deposition. He had been there about eight hours
6 being interrogated. Maybe that explains his mannerism a
7 little bit.

8 What did he say? He says: Not the best
9 decision I ever made. Well, what else would you say if
10 you were somebody sitting there being inquisitioned
11 (sic) by Baker Botts for nine hours?

12 What he didn't show you is the testimony
13 from Quality Fab. Quality Fab, guys named Mr. Peter and
14 Norman know their equipment, not Mr. Trowbridge.

15 Both of them testified in this case in
16 depositions that there was nothing proprietary about any
17 of the equipment we inspected.

18 And the confidentiality agreement between
19 Quality Fab and Frito-Lay is between Quality Fab and
20 Frito-Lay. Frito-Lay didn't sue Quality Fab. Quality
21 Fab doesn't sell 4-dollar chips -- 2-dollar chips
22 against their 4-dollar chips.

23 Quality Fab (sic) sued us. Of course,
24 Quality Fab also doesn't make Cheese Puffs and corn
25 chips and Doritos and other things.

1 Folks, the best proof we have that we
2 didn't steal any trade secrets in this case, though, are
3 the processes themselves. Our process is nothing like
4 Frito-Lay's process where it counts, and that's what I
5 want to show you a little bit of right now as I get to
6 the end.

7 I want to show you Frito-Lay's
8 manufacturing process. I want to show you first
9 Defendants' Exhibit No. 1. This is that TV show we've
10 all been talking about. It will take a few minutes to
11 run, but I think it's worth seeing. And I want you to
12 see it not because it's public disclosure. I want you
13 to know that, that it's their process.

14 Let's take a look, Defendants' Exhibit 1.
15 (Video clip playing.)

16 MR. HILL: Do you see the cook room?

17 (Video clip continues.)

18 MR. HILL: The soaking and washing
19 equipment.

20 (Video clip continues.)

21 MR. HILL: Here's that toaster oven we
22 don't have.

23 (Video clip continues.)

24 MR. HILL: 20 to 30 percent of oil --

25 (End of video clip.)

1 MR. HILL: Folks, what's curious about
2 that Food Network video is the part that they said was
3 Tostitos is a Frito-Lay secret. I want to show you what
4 that secret was so that you'll have seen the entire
5 manufacturing process.

6 Let's look at Defendants' Exhibit 238.

7 At 18, 24, Jack.

8 (Video clip playing.)

9 MR. HILL: This is their line. This is
10 what they didn't show you in the Food Network video.
11 There we are coming down the line, coming out of the
12 toaster that we don't have.

13 Remember, they've got to land these
14 things on little molds, so they've got to have them in
15 alignment.

16 And here comes that alignment system.
17 See those chips jumping around over here, some of them.

18 Watch them. See them moving, getting
19 trued up. Happens fast because it's a high-speed
20 system. But you watch; you'll see them jump.

21 Apologize for that part of the video.
22 It's like the Blair Witch Project.

23 See them moving? See them truing them
24 up? Those are those little nubs grabbing them and
25 pushing them into a line. See, that's what the patent

1 is talking about. That's what we don't do, but it's
2 what they claim. They claim trade secrets when our line
3 where it counts, where it's anything other than industry
4 standard equipment that they're willing to show on TV
5 where our lines are completely different.

6 Now let me show you another picture of
7 that alignment system.

8 Let's go to 255, if we can, Jack. This
9 is a slow motion of that alignment system.

10 No, no, no. That's not it. Defendant's
11 Exhibit 255.

12 Well, while Jack finds it, let me make a
13 point. I think you can see there it's moving a little
14 fast. I want to show it to you slowed down, but I won't
15 hold us up.

16 That alignment system is nothing like
17 ours. That alignment system is the only part of the
18 process that's not such common industry equipment that
19 they don't put it on TV for the Food Network. And
20 that's the part that's not going to align.

21 If that doesn't align with the trade
22 secret claim, I don't know what could better show it.
23 If somebody accuses you of stealing -- if somebody
24 steals your car, their new car looks a lot like your old
25 car.

1 Now, I want to show you our process again
2 so you can make the direct comparison. You saw some of
3 it, but I want you to see it again, beginning to end.
4 Defendants' Exhibit 201.

5 (Video playing.)

6 MR. HILL: Okay. There's our process
7 again that you saw. There's our sheeter cutter making
8 our chips, and the reason I want to show you this -- I
9 know you've seen parts of it already. I don't want to
10 belabor it or drag this out any more than it has to be.
11 I want you folks to know that we want to put the
12 evidence right in your lap, because we want you to look
13 at it. And I am showing you the whole thing. No
14 slighting going on here.

15 (Video clip continues.)

16 MR. HILL: There are the chips being
17 sheeted into rows off the cutter.

18 I tell you what, this is not that whole
19 clip. This is the produced clip. Can we go to the
20 whole video, 201?

21 (Video clip playing.)

22 MR. HILL: All right, here we go. Here's
23 our product coming in just like they started in the
24 Frito-Lay video. Here's the corn coming in. Industry
25 standard. Similar industry standard equipment, because

1 that's how you make tortilla chips.

2 There's our corn being transported into
3 the system. There's our pictures you were seeing
4 earlier of the cutter roller. They stopped it there to
5 take those pictures. You can see that's how those still
6 photos you got to see came about.

7 (Video clip continues.)

8 MR. HILL: All right. There it is where
9 you picked up earlier, making the chips.

10 Can we go ahead just a minute or two in
11 the interest of time?

12 Folks, I apologize for ambushing Jack
13 over here. He didn't know I was going to try to move
14 through it like this, but I was trying to save us a
15 little time.

16 Well, I tell you what, we will just let
17 it play and I'll tell you what I want you to know about
18 it.

19 (Video clip continues.)

20 MR. HILL: Folks, our system works better
21 and cheaper and more efficiently, because we eliminated
22 the toaster and we eliminated the need for the costly
23 alignment system. We made a better mousetrap. We did
24 what the Patent Office tells you to do.

25 And because it's new and better and

1 because we know it's new and better, we filed our own
2 patent application on it. If we stole it from
3 Frito-Lay, do you think we would be so bold to go file
4 it with the Patent Office?

5 And speaking of bold, part of what
6 Frito-Lay is asking for in this case is to take our
7 patent application. Ladies and Gentlemen, we haven't
8 stolen any trade secrets. Frito-Lay knows it. It's not
9 hype. That's the proof. It's also proof what the case
10 is about, \$4 versus \$2.

11 I'll finish where I started. This case
12 is about free-market competition and consumer choice.
13 The courtroom is different than a flashy TV ad. You've
14 got to bring proof, not just a narrative. And the
15 greatest lie detector in this world is sitting in that
16 box right there, the jury trial.

17 We appreciate your time in this case. We
18 appreciate your energy. We appreciate the hard work
19 that you're going to put in. And most importantly, we
20 appreciate your fairness in listening to the evidence
21 and making a decision based on the evidence in the case,
22 because ultimately what happens here at the courthouse
23 is supposed to be about justice.

24 Medallion's done nothing wrong except
25 having the guts to compete, \$4 versus \$2, and we think

1 when the case plays out, you will agree with us. I
2 appreciate your time. You'll get a chance to see these
3 videos full length over the next week, probably more of
4 them than you ever want to see. And we think the
5 evidence will be proved up.

6 Thank you.

7 THE COURT: Thank you, Mr. Hill.

8 Ladies and Gentlemen of the Jury, we're
9 going to go ahead and take our lunch break at this time.
10 And, again, same thing I've been telling you over and
11 over again. Please don't discuss the case with anyone
12 or do any kind of research or anything about the case.

13 And then if an hour and 15 minutes is
14 sufficient, we will come back at 1:30. Be back at 1:30
15 and we will start back and start hearing the evidence.

16 Thank you.

17 COURT SECURITY OFFICER: All rise for the
18 jury.

19 (Jury out.)

20 THE COURT: Please be seated. And,
21 Mr. Hill, just to be fair, you also went over a few
22 minutes.

23 MR. HILL: I apologize, Your Honor.

24 THE COURT: No, no apology necessary.

25 The Plaintiffs went over a few minutes, and you went

1 over a few minutes from him.

2 So -- and then one thing is, of course,
3 when the jury comes back, I will go ahead and enter the
4 exhibits. I have Plaintiff's unobjected-to list. I
5 don't know if I ever received the Defendants'
6 unobjected-to list.

7 MR. HARLAN: We will bring it up in 30
8 minutes.

9 THE COURT: That's fine. And show it to
10 Mr. Durst or someone with him.

11 MR. HARLAN: We will.

12 MR. DURST: Not yet, but we will look at
13 it.

14 THE COURT: Then who's our first witness
15 after? Is it going to be a live witness?

16 MR. DURST: Yes, Your Honor. It's going
17 to be Mr. Z.

18 THE COURT: Mr. Z. I'm looking forward
19 to hearing from Mr. Z.

20 The jury will have clipboards with the
21 questions, the form of the questions that went out.

22 MR. DURST: Okay, great.

23 THE COURT: So we'll be passing those
24 out, and they will have those when they come back.

25 Anything else?

1 MR. DURST: Yes, Your Honor. May I raise
2 a couple of issues real quick? It will be fast.

3 THE COURT: That's fine. Don't worry.

4 MR. DURST: Can I borrow something over
5 here, fellows?

6 THE COURT: You can flip the lights back
7 on, Mr. Strandlien.

8 MR. DAWSON: You see these (indicating),
9 Your Honor?

10 I just noticed this this morning. This
11 is subject to a motion in limine, and they have had it
12 stacked out here the whole time. There is a motion in
13 limine, Your Honor, that says that they're not to --
14 they're not to mention any claims we haven't dropped --
15 you gave that whole spiel about -- or that we're not
16 asserting. You heard that whole spiel about Jackie
17 Price.

18 He played deposition testimony, Your
19 Honor, in opening that has not even been designated in
20 the case.

21 THE COURT: Well, I'm going to ask that
22 first, Mr. Hill, did you play that?

23 Please go to the microphone or have a mic
24 on.

25 MR. HILL: Your Honor, I played about

1 three to -- maybe an eight-second clip of their witness,
2 Janelle Anderson, is the only deposition testimony I
3 played. And I believe that testimony has been
4 designated in the case by one party or the other. We
5 thought it was fair game to use.

6 It's their witness who we think is going
7 to testify live. We don't know that, so we played a
8 clip of the depo. She's a will-call witness.

9 MR. DURST: She's coming, Judge, but the
10 deposition testimony has not been designated.

11 Here's the point, Your Honor: Mr. Hill
12 showed a pendant -- a penchant for time and again
13 violating the Court's motion in limine orders, and you
14 saw, Your Honor, how he argued the pin alignment system,
15 which I thought was against the spirit of another ruling
16 the Court made where he said: You see how Frito-Lay
17 does it? We don't do it; therefore, we don't infringe
18 the patent.

19 MR. HILL: Your Honor, I --

20 MR. DURST: Your Honor, I urge the Court
21 to -- and I'm not going -- I didn't want to do it. I
22 chose not to do it in opening, but we've got to put
23 these lawyers on a little bit careful leash -- a little
24 bit more careful leash, Your Honor, in terms of
25 following the Court's orders.

1 It's -- it's -- it shows lack of order
2 and respect for the Court's orders for him to get up
3 there and do what he just did, Your Honor. There's the
4 STAX motion in limine. There's the Janelle testimony
5 that's not designated. There's the Jackie Price motion
6 in limine. There's the direct comparison of their
7 system to our system to argue non-infringement, which
8 the Federal Circuit could not say any clearer is
9 inappropriate.

10 MR. HILL: Your Honor, I never made a
11 comparison between their system and the patent. I
12 discussed it as the contents of trade secrets as the
13 Court has said it is relevant, and that's it. The Court
14 gave a proper limiting instruction on that thing, and I
15 never violated a limine motion one.

16 MR. DURST: But a limiting instruction,
17 Your Honor, is not a license to violate the law. The
18 quote is -- and we'll have the transcript shortly. The
19 quote is: It's what that patent does -- showing our
20 system.

21 MR. HILL: Showing it's in the public
22 domain.

23 MR. DURST: It's what we don't do.

24 MR. HILL: Showing we didn't
25 misappropriate a trade secret. I didn't mix trade

1 secret claims and patent claims in one case, Judge.

2 MR. DURST: Your Honor, you saw that list
3 yesterday. There is no -- there is -- we -- you
4 required us, and we've done it now, to give you a list
5 of our trade secrets. There isn't a one of them that
6 says anything about a pin alignment system.

7 MR. HILL: Judge, to respond to that
8 particular point -- it's what I just showed the jury,
9 and it's as fair as fair can be -- this is their list
10 you ordered them to produce, Interrogatory No. 5 list,
11 of what they allege is a trade secret in this case.

12 This is what's alleged: How Frito-Lay
13 operates its tortilla chip lines. How that doesn't make
14 the whole line appropriate to be discussed in the
15 context of a trade secret when they've told us that's
16 what they're suing us on now, I couldn't understand
17 more. I mean, how do I not show the line if they say
18 the line is the trade secret?

19 Mr. Durst doesn't like the evidence. I
20 understand. He shouldn't. It's not good for him, but
21 it's not improper in any way.

22 THE COURT: Well, what is improper is
23 that making any assertion that their system and your
24 system is not the same in regards to infringement.

25 MR. HILL: With regard to the patent,

1 absolutely.

2 THE COURT: And so just make it clear as
3 you go forward, and especially when you get to closing
4 argument, I would suspect if that happens again,
5 Mr. Durst will object and I will sustain that objection,
6 and I will give the limiting instruction to the jury
7 before they get the charge.

8 I want to make sure we keep that clear,
9 because that's not proper, and I think you know it's not
10 proper. And so I understand you're walking a fine line
11 regarding the issue of trade secrets, but make sure you
12 clearly say this argument relates to the trade secret
13 issue, and then we will deal with that.

14 Now, as I said, please cover up the issue
15 with the Pringles.

16 MR. DURST: I certainly will, Your Honor.
17 I'm going to withdraw that motion in limine. I hereby
18 withdraw that motion in limine. So they can leave it
19 there.

20 MR. HILL: Judge, we haven't used it.

21 THE COURT: You raised the issue. Why
22 now are you upset?

23 MR. DURST: Because, Your Honor, Your
24 Honor the -- the -- it's been setting over there during
25 voir dire and this morning. It's out in the open. I'm

1 going -- I'm going to have to deal with it in front of
2 the jury.

3 MR. HILL: Your Honor, that's hardly been
4 highlighted by -- I don't know if they can see it past
5 the people.

6 MR. DURST: In any event, Your Honor,
7 it's my motion and I withdraw the motion.

8 THE COURT: No, that's fine. I'll grant
9 you that request. I doubt that they've even noticed it,
10 so I'm not sure that anyone else noticed it.

11 MR. HILL: Your Honor, just one other
12 thing, and this is a point of pride for me, so maybe I
13 probably ought to keep my mouth shut. But the idea that
14 we're over here engaging in some hooligan stuff is
15 nonsense. We're trying a lawsuit that he brought,
16 claims that he put in the case together, and we're doing
17 it fairly.

18 I didn't violate a limine order one, and
19 there was no objection during the whole thing and the --
20 I just want the Court to know that we -- you know, that
21 kind of allegation we don't take lightly, and we don't
22 take the Court's orders lightly and so...

23 THE COURT: I understand. I just want --
24 let's just be mindful of the orders, and I do think
25 that -- just be careful when you get to closing argument

1 that the arguments you're making relates to trade secret
2 and not -- and not to infringement.

3 MR. HILL: Absolutely, Your Honor. I
4 made that clear in the argument. I made specifically
5 clear to the jury that the comparison for patent
6 infringement was the claim and the claim language to our
7 accused process. I'm doing my best to abide by what the
8 Court says the way we try the lawsuit.

9 THE COURT: Anything else?

10 MR. DURST: No, Your Honor. See you at
11 1:30?

12 THE COURT: Yes. 1:30.

13 COURT SECURITY OFFICER: All rise.

14 (Lunch recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
JUDITH WERLINGER, CSR
Official Court Reporter
State of Texas No.: 731
Expiration Date 12/31/14

Date

/s/_____
SUSAN SIMMONS, CSR
Official Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

Date